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IT'S NOT BLACK AND WHITE: *SPENCER v. CASAVILLA** AND THE USE OF THE RIGHT OF INTRASTATE TRAVEL IN SECTION 1985(3)

INTRODUCTION

The Second Circuit's decision in *Spencer v. Casavilla* recognized the right of intrastate travel and allowed it to be used for the first time in the context of a civil rights claim under title 42, section 1985(3).¹ Regrettably, the court did not identify the source of this right, and the failure to do so affects the civil rights statute in a way unrecognized by the court's decision. If the Second Circuit had deemed the source of the right of intrastate travel to be the Fourteenth Amendment, then the court should have required a showing of "state action" in order to establish the violation of an independent constitutional right that section 1985(3) requires.² Because the court did not investigate the source of the intrastate right, it did not require such state

* 903 F.2d 171 (2d Cir. 1990) (before Kears, Cardamone & Mahoney, JJ.; opinion per Kears, J.).

¹ 42 U.S.C. § 1985(3) (1988) provides in pertinent part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The language of the statute requires a conspiratorial purpose to deprive persons of equal protection or privileges and immunities, and therefore a claim under § 1985(3) requires an allegation that some independent constitutional right was violated.

² See *Carpenters v. Scott*, 463 U.S. 825 (1983), and discussion at notes 242-50 and accompanying text *infra*.

In *Spencer*, since there was no state action, either alleged by the plaintiffs or apparent from the facts, the plaintiffs' claim should have been dismissed unless the Second Circuit determined that the right of intrastate travel is additionally secured against deprivation by purely private parties.

action, and the court's action was therefore an invitation to improperly founded causes of action.

Aside from causing confusion for law review commentators,³ the lack of a designated source for the right to travel has not been particularly troublesome. However, now that the right of intrastate travel is being asserted as a right protected by the federal Constitution, lower courts need the guidance they have lacked in the past. The courts cannot protect the right of intrastate travel within the bounds of precedent without a designated constitutional source for that right.

An extensive analysis of *Spencer* and the confusing body of law surrounding both section 1985(3) and the right to travel leads to the proposition that state action was indeed a required component of the plaintiffs' claim. Furthermore, since there was no such showing, this would require the dismissal of the *Spencers'* case. Such a result seems particularly undesirable in a case that has all the hallmarks of racial violence which section 1985(3) was designed to remedy.⁴ Therefore, the time has come for the Supreme Court to clear up the confusion surrounding the possible existence of a federally protected right of intrastate travel and to settle once and for all how section 1985(3) can be used to combat the racial violence it was designed to prevent. The Court must reach a result that does not classify every confrontation between people of different races as one of federal constitutional proportions.

This Comment will focus first on the right to travel and determine that the source of a federal right of intrastate travel can be found in the Fourteenth Amendment's Due Process Clause. The analysis will then turn to the Civil Rights Act under which the plaintiffs in *Spencer* filed suit. An examination of the statute, its history, and its connection with the right to travel will show that the right of intrastate travel cannot be asserted under

³ See, e.g., Note, *The Unconstitutionality of "Antihomless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 75 CALIF. L. REV. 595 (1989) [hereinafter *Antihomless*]; Comment, *Intrastate Residence Requirements for Welfare and the Right to Intrastate Travel*, 8 HARV. C.R.-C.L. L. REV. 591, 602 (1973) [hereinafter *Intrastate Residence*]; Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 116 (1975) [hereinafter *Right to Travel*].

⁴ In *Spencer* a black man died as a result of a brutal beating by four white men. 903 F.2d at 172. See notes 193-201 and accompanying text *infra*.

section 1985(3) without a showing of state action. Therefore, this Comment concludes that *Spencer v. Casavilla* was wrongly decided.

I. BACKGROUND OF THE CASE

A. *The District Court Decision*

Spencer v. Casavilla arose from an attack on Samuel Benjamin Spencer, a twenty-year-old black resident of Westchester County, New York.⁵ The attack, which resulted in Spencer's death, occurred on May 28, 1986, in Kings County, New York.⁶ Four white residents of Kings County were charged and subsequently convicted in connection with Spencer's death.⁷

The plaintiffs in *Spencer* were the parents of the decedent. They filed a civil complaint alleging that the defendants individually and in concert had deprived Spencer of certain constitutional rights otherwise protected under the Civil Rights Act, sections 1981,⁸ 1985(3) and 1986,⁹ and by state law.¹⁰ Plaintiffs

⁵ 903 F.2d at 172.

⁶ *Id.* In the early morning hours of May 28, Spencer, who was walking on the public streets in Coney Island, was "savagely punched and kicked, beaten with a baseball bat, and repeatedly stabbed with a knife." *Id.*

⁷ *Id.* Douglas Mackey pleaded guilty to attempted manslaughter in the first degree and cooperated with the prosecution. N.Y. PENAL LAW § 125.20 (McKinney 1987). Frank Casavilla pleaded guilty to second-degree murder and was sentenced to 15-years-to-life. N.Y. PENAL LAW § 125.25 (McKinney 1987). Cosmo Muriale pleaded guilty to first-degree manslaughter and received an 8½-to-15-year prison sentence. N.Y. PENAL LAW § 125.20 (McKinney 1987). Frank D'Antonio was found guilty, after a jury trial, of third-degree assault and received a one-year sentence of imprisonment. N.Y. PENAL LAW § 120.00 (McKinney 1987). See also *Spencer*, 903 F.2d at 172.

⁸ 42 U.S.C. § 1981 (1988) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

⁹ 42 U.S.C. § 1986 (1988) provides in pertinent part:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent and or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented.

¹⁰ *Spencer v. Casavilla*, 717 F. Supp. 1057, 1058 (S.D.N.Y. 1989). The plaintiffs al-

sought compensatory and punitive damages on behalf of their son for his pain and suffering and on behalf of themselves for the loss of their son.¹¹

Since the defendants were without counsel, District Judge Haight raised, *sua sponte*, the question of federal jurisdiction.¹² The court first concluded that the plaintiffs' claim under section 1981 was not viable.¹³ The district court next turned to section 1985(3) as a possible source of federal jurisdiction.¹⁴

The court applied the test established by the Supreme Court in *Griffin v. Breckenridge*¹⁵ to determine whether the plaintiffs had a cause of action under section 1985(3).¹⁶ This four-part test requires a plaintiff to allege (1) a conspiracy; (2) that the purpose of the conspiracy was to deprive a person or class of the equal protection of, or the privileges and immunities under, the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to plaintiff's person or property or a deprivation of a right or privilege of United States citizenship.¹⁷ Since section 1985(3) does not confer any independent substantive rights, plaintiffs must allege the deprivation of a right elsewhere guaranteed by the Constitution.¹⁸

The district court referred to the Seventh Circuit's decision in *Stevens v. Tillman*¹⁹ for three types of rights that are actiona-

leged that defendants' actions violated state assault and murder laws. *Id.* at 1062. The plaintiffs also alleged that defendants violated Spencer's rights under the Thirteenth Amendment. 903 F.2d at 172. However, the Second Circuit chose not to discuss this claim since it found for the plaintiffs on their § 1985(3) claim which asserted the deprivation of the right of intrastate travel.

¹¹ *Spencer*, 903 F.2d at 172. The defendants were the same four men who were criminally prosecuted and convicted in connection with Spencer's death. The complaint also included as defendants unidentified "John Does." 717 F. Supp. at 1058. None of the four defendants were represented by counsel during the civil proceedings. *Id.*

¹² *Spencer*, 717 F. Supp. at 1058.

¹³ Judge Haight determined that the plaintiffs had not alleged the state action necessary to support a claim under the relevant clauses of § 1981. *Id.* at 1058-59.

¹⁴ *Id.* at 1060.

¹⁵ 403 U.S. 88 (1971). In *Griffin* several white men (defendants) stopped and physically harassed several black men (plaintiffs). The plaintiffs were successful in their § 1985(3) suit in which they alleged, among other things, a conspiracy by defendants to deprive them of their right to travel interstate. See text accompanying notes 219-20 *infra*.

¹⁶ *Spencer*, 717 F. Supp. at 1060.

¹⁷ *Griffin*, 403 U.S. at 102-03.

¹⁸ *Great Am. Fed. Sav. and Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). See notes 240-41 and accompanying text *infra*.

¹⁹ 855 F.2d 394 (7th Cir. 1988).

ble under section 1985(3).²⁰ The court showed that the plaintiffs did not assert one of these rights.²¹ The first possibility, that the rights allegedly infringed were based in federal law, was rejected; the district court determined that there were no allegations implicating a federally created or protected right.²² The second possibility, that the right was founded in state law but the deprivation of that right interfered with a federal right, was also rejected.²³ The district court pointed out that the complaint clearly alleged a violation of state assault and murder laws but did not allege how this conduct in turn "offended a federal constitutional or statutory rule designed for the protection of all."²⁴ Lastly, the court noted that, under *Stevens*, the right could be one that was protected only against governmental action.²⁵ However, such cases require that defendants be state actors or actors influencing the state.²⁶ In *Spencer* the defendants were private actors. Thus, the court disposed of the possible sources for rights infringed by conspiracies under section 1985(3) and found that the plaintiffs could not rely on that statute for federal jurisdic-

²⁰ In *Stevens* a white principal sued the black president of a parent-teacher association under § 1985(3) with a "type three" claim that the defendants influenced the board of education, a state actor, in its plot to have her removed. As articulated by the *Stevens* court, the three types of conduct reached by § 1985(3) are:

1. Racially-motivated private conspiracies to deprive persons of rights secured to all by federal law
2. Racially-motivated private conspiracies to deprive persons of rights secured to all by state law, where the deprivation interferes with the exercise of a federally-protected right
3. Racially-motivated conspiracies to deprive persons of rights secured only against governmental action . . . provided the defendants are either "state actors" or seeking to influence the state to act in a prohibited way.

Id. at 404 (citations omitted).

²¹ *Spencer*, 717 F. Supp. at 1060-61.

²² *Id.* at 1061. Judge Haight contrasted the present case with *Griffin*, where a conspiracy violated the Thirteenth Amendment and the federal right of interstate travel.

The district court did not explicitly address the possibility that the violation of the plaintiffs' right to travel intrastate was actionable under § 1985(3). Instead it simply stated that the plaintiffs' case did not fit into one of the acceptable categories of cases. Therefore the court's decision implied that the right to travel intrastate was either not a federally protected right, or it was one that required a showing of state action, which was not present in this case.

²³ *Id.*

²⁴ *Id.* at 1062.

²⁵ As an example, the Seventh Circuit suggested that conduct which infringed on the right of free speech granted in the First Amendment would satisfy the third option. *Stevens*, 855 F.2d at 404.

²⁶ *Id.*

tion.²⁷ Therefore, the court concluded that the complaint had to be dismissed either for lack of federal jurisdiction or for failure to state a claim upon which relief could be granted.²⁸

B. *The Second Circuit Decision*

Plaintiffs appealed from the judgment of the Southern District of New York to the United States Court of Appeals for the Second Circuit.²⁹ The Second Circuit examined the complaint and determined that because it was not frivolous, there was federal jurisdiction even if the claim would be subsequently dismissed for failure to state a claim upon which relief could be granted.³⁰ The Second Circuit, in an opinion by Judge Kearse, then examined the section 1985(3) claim and found it to be actionable.³¹

According to the court, the plaintiffs' allegations that the defendants conspired with racially discriminatory animus to violate the decedent's right of intrastate travel easily satisfied the criteria established in *Griffin*.³² Without going into the same amount of detail as the district court had, the Second Circuit explained that a section 1985(3) claim had to assert the deprivation of a right covered by the "Constitution or other law."³³ The court then stated that the right to travel intrastate satisfied this requirement and cited *Carpenters v. Scott*.³⁴ Although the Su-

²⁷ *Spencer*, 717 F. Supp. at 1062.

²⁸ *Id.* The district court did not explicitly choose one of these reasons as the ground for dismissal, apparently because either was sufficient. The § 1986 claim was addressed in a footnote in which the district court found that without a valid § 1985 claim there could be no § 1986 claim, because § 1986 provides a remedy for unrecognized violations of § 1985. *Id.* at 1062 n.1.

²⁹ *Spencer v. Casavilla*, 903 F.2d 171 (2d Cir. 1990).

³⁰ *Id.* at 173 ("The court should not dismiss a complaint asserting a non-frivolous claim under federal law for lack of jurisdiction even if the complaint fails to state a claim upon which relief can be granted.").

³¹ *Id.* at 174.

³² *Id.* See also notes 15-18 and accompanying text *supra*.

"Racial animus," an element of a § 1985(3) claim, refers to the "invidiously discriminatory motivation" of the conspirators. See *Griffin*, 403 U.S. at 101-03.

³³ *Spencer*, 903 F.2d at 174.

³⁴ 463 U.S. 825 (1983). The plaintiffs in *Carpenters* brought a § 1985(3) claim alleging a conspiracy aimed at depriving them of their First Amendment rights. *Id.* at 830. This is a "type three" claim under *Stevens*. See note 20 *supra*. The plaintiffs' claim failed because they did not prove involvement by the state as is required when asserting the deprivation of a federal right protected against state infringement. *Carpenters*, 463 U.S. at 833.

preme Court denied the plaintiffs' claim in *Carpenters*, the Court explicitly reaffirmed the rule set forth in *Griffin* that a section 1985(3) claim could be successful in *some* purely private conspiracy cases.³⁵ Noting that the Supreme Court has only dealt with a private conspiracy to deprive someone of the right of interstate travel in *Griffin*, the Second Circuit then held that the same analysis applies to intrastate travel.³⁶

The court relied on another Second Circuit case, *King v. New Rochelle Municipal Housing Authority*,³⁷ for the existence of the right of intrastate travel. *King* upheld the invalidation of a durational residence requirement for receiving public housing.³⁸ Because some of the plaintiffs in *King* had moved to New Rochelle from elsewhere in New York, as opposed to emigrating from another state, the *King* court had to address the issue of intrastate travel. The *King* court found that it would be "meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."³⁹ Consequently, *King* stands for the proposition that the Constitution also protects the right of intrastate travel.⁴⁰ Furthermore, the Second Circuit found that the Supreme Court, by choosing not to determine the precise source of the right to travel, had deliberately left open the possibility of a right of intrastate

The *Spencer* court cited to the portion of the *Carpenters* opinion in which the Supreme Court reaffirmed its holding in *Griffin* that § 1985(3) protects against purely private conspiracies to bolster its holding that state action was not a required component of the *Spencers'* claim. *Spencer*, 903 F.2d at 174 (citing *Griffin*, 403 U.S. at 105 and *Carpenters*, 463 U.S. at 832-35).

³⁵ *Carpenters*, 463 U.S. at 832-33. The *Carpenters* Court pointed out that under *Griffin* a § 1985(3) claim alleging a conspiracy to deprive plaintiffs of certain federally protected rights does not require a showing of state action if those rights are protected against private interference. *Id.* at 833. The rights asserted by the *Griffin* plaintiffs, the right of interstate travel and the rights under the Thirteenth Amendment, are such privately actionable rights. *Id.*

³⁶ *Spencer*, 903 F.2d at 174-75.

³⁷ 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971) (A five-year residency requirement for admission to public housing was held to violate the Equal Protection Clause of the Constitution because it impermissibly burdened the fundamental right of intrastate travel.).

³⁸ *Id.*

³⁹ *Id.* at 648.

⁴⁰ *Spencer*, 903 F.2d at 174. The *Spencer* court cited *King* and said, "our Court has held that the Constitution also protects the right to travel freely within a single state." *Id.*

travel.⁴¹ This invitation allowed the Second Circuit to use *King* to fill in the gap left open by the Supreme Court. The *Spencer* court thus concluded that the plaintiffs' assertion that they were denied the right of intrastate travel qualified as a claim that a constitutionally protected right had been denied.⁴² Moreover, according to the court, the plaintiffs were not required to allege state action because the right to travel had been used successfully in *Griffin* against private defendants in a section 1985(3) claim.⁴³ In conclusion, the Second Circuit held that the plaintiffs had an actionable claim under section 1985(3).

II. ANALYSIS

A. Sources for the Right of Interstate Travel⁴⁴

Even though the Supreme Court has officially recognized

⁴¹ *Id.* See also *Shapiro v. Thompson*, 394 U.S. 618, 630 n.8 (1969) ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.").

⁴² *Spencer*, 903 F.2d at 175. This claim is a type-one claim under the *Stevens* model. See note 20 *supra*.

⁴³ *Id.* at 175 (A plaintiff can satisfy the requirements of § 1985(3) "by alleging that private defendants have . . . violated his constitutional right to travel within a given state.") (emphasis added).

Remember, however, that *Griffin* involved the right of interstate travel and *Spencer* involves the right of intrastate travel. See note 15 *supra*. This distinction is important because the two rights need not come from the same constitutional source, and therefore the right of interstate travel can be asserted without alleging state action, while the right of intrastate travel may require a showing of state action.

"Historically, the right of interstate travel has roots that predate not only the United States Constitution, but also the New World. For example, the Magna Carta guaranteed "free passage into and out of the realm." MAGNA CARTA ch. 42 (1215). On this continent the right appeared in the Pennsylvania Constitution of 1776. PA. CONST. of 1776 ch. 1, para. XV. Article IV of the Articles of Confederation explicitly provided for the right with this language: "The free inhabitants of these states . . . shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state . . ." ARTICLES OF CONFEDERATION art. IV.

When the Framers drafted the United States Constitution as a replacement for the Articles of Confederation, they did not mention the right to travel. See *United States v. Guest*, 383 U.S. 745, 758 (1966) ("Although the Articles of Confederation provided [for the right of interstate travel,] that right finds no explicit mention in the Constitution."). Yet, since no one would doubt that citizens of the United States are afforded the right of interstate travel, the right must be implicit in the Constitution. See notes 52-116 and accompanying text *infra* for discussion of possible constitutional sources. The notions of federalism that the Framers were seeking to protect in the Constitution provide additional support for the existence of a right of interstate travel. See *Guest*, 383 U.S. at 758 (suggesting that the reason the right does not appear in the Constitution is that it was

the existence of the right of interstate travel,⁴⁵ it has declined to find a source for this right.⁴⁶ For the purposes of this Comment, however, it is important to determine from which constitutional provision the right of interstate travel originates in order to find the source of the right of intrastate travel.

The Supreme Court has not yet directly answered the question whether there is a constitutionally protected right of intrastate travel. In *United States v. Guest*⁴⁷ the Court referred to the "right to travel from one state to another" and also to the "freedom to travel throughout the United States."⁴⁸ The latter suggests that the right to travel could include intrastate travel. For this reason, and because the only Supreme Court precedents available deal explicitly with the right to travel interstate, an analysis of the possible sources of the right of interstate travel sheds light on the possible sources for an intrastate right.⁴⁹ Fur-

considered so elementary that it "was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.").

After the ratification of the Constitution, the apparent absence of a textual source for the right to travel was not the source of much controversy. Indeed the right of interstate travel did not receive judicial recognition until 1823 when Justice Washington, acting as circuit court judge, mentioned it in dicta in *Corfield v. Coryell* 6 F. Cas. 546. (C.C.E.D. Pa. 1825) (No. 3230). Finally, in 1849, the right to travel was approved by the Supreme Court in *Smith v. Turner, The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) ("We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."). For further discussion of the early history of the right of interstate travel, see *Antihomelless*, *supra* note 3, at 606.

⁴⁵ See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁴⁶ *Id.* at 630. In *Shapiro* the Court addressed whether deterring the immigration of indigents was a constitutionally permissible purpose of Connecticut, Pennsylvania and District of Columbia statutes that denied welfare benefits to people who had resided in the jurisdiction for less than one year. *Id.* at 631. Since the Court determined that such statutes deterred interstate travel, the Court needed only to decide whether interstate travel is constitutionally protected. Quoting language from *United States v. Guest*, 383 U.S. 745 (1966), see note 93 *infra*, the Court found that the right to travel interstate had such a long history of recognition that it was unnecessary to ascribe a specific source to the right. *Shapiro*, 394 U.S. at 630-31. Thus the Court was able to say: "We have no occasion to ascribe the source of this right to travel interstate to a particular provision." *Id.*

⁴⁷ 383 U.S. 745 (1966).

⁴⁸ *Guest*, 383 U.S. at 757, 758. In *Guest* the complainants alleged among other things that "defendants conspired to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of" the right of interstate travel. *Id.* at 757.

⁴⁹ While the possible sources for interstate and intrastate travel rights are identical, and while it is also possible that the interstate right includes the intrastate right, nothing precludes the concept of independent sources for each of these rights.

thermore, the sources of these rights are important because they determine whether the rights are secured against governmental or private interference and therefore whether state action must be asserted when claiming a violation of either of these rights.⁵⁰

1. Article IV, Section 2: The Privileges & Immunities Clause⁵¹

There are six constitutional sources that are most frequently linked to the right of interstate travel.⁵² The Privileges and Immunities Clause of article IV, section 2 was the most likely source at the time of the drafting of the Constitution, and it is still the source of preference for some today.⁵³

Historically, the Privileges and Immunities Clause in article IV, section 2 has been an appealing basis for the right to travel, since it was intended as the Constitution's equivalent of article IV of the Articles of Confederation.⁵⁴ Because the Articles of Confederation explicitly granted all inhabitants of the states the

⁵⁰ See *Lutz v. City of York*, 899 F.2d 255, 264 (3d Cir. 1990). The Third Circuit in *Lutz* was searching for the source of a right to travel intrastate to determine whether a city ordinance outlawing repeated driving around local roads ("cruising") infringed on any constitutionally protected rights. *Id.* at 256. The court pointed out that the source of the right to travel intrastate could determine whether state action must be alleged when asserting a violation of this right. Specifically, the court referred to the Fourteenth Amendment, noting that rights created by this amendment are protected only against infringement by state actors. *Id.* at 264. However, the court said that the rights of national citizenship, which are protected but not created by the Fourteenth Amendment's Privileges and Immunities Clause are protected against infringement by purely private actors as well. See notes 63-69 and accompanying text *infra*. The *Lutz* court concluded that the source of the right of intrastate travel is the Fourteenth Amendment's Due Process Clause. *Lutz*, 899 F.2d at 267. This court did not have to identify the source for the right of interstate travel since that issue was not before the court.

⁵¹ "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

⁵² The six possibilities are: (1) article IV, section 2, (2) Fourteenth Amendment's Privileges and Immunities Clause, (3) Fourteenth Amendment's Due Process Clause, (4) Fifth Amendment's Due Process Clause, (5) article I, section 8 (the "Commerce Clause") and (6) no particular source.

⁵³ An early case that found the right of interstate travel to be protected by article IV, section 2 was *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871) ("[T]he [Privileges and Immunities] clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union."). Recently, Justice O'Connor resurrected the Privileges and Immunities Clause of article IV, section 2 as her choice for the embodiment of the right of interstate travel. *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (O'Connor, J., concurring).

⁵⁴ *Zobel*, 457 U.S. at 79 (O'Connor, J. concurring); See *Intrastate Residence*, *supra* note 3, at 602.

right "to free ingress and regress to and from any other state,"⁵⁵ the constitutional provision that was supposed to replace the Articles of Confederation provision must also have included such a right to travel. The Supreme Court in *United States v. Wheeler*⁵⁶ defined the origins and purposes of the clause when it reasoned:

That the Constitution plainly intended to preserve and enforce the limitation as to discrimination imposed upon the States by Article IV of the Articles of Confederation, and thus necessarily assumed the continued possession by the States of the reserved power to deal with free residence, ingress and egress, cannot be denied for the following reasons: (1) Because the text of Article IV, § 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations; and (2) because that view has been so conclusively settled as to leave no room for controversy.⁵⁷

This argument comports with the Framers' federalist concerns while drafting the Constitution.⁵⁸

The early cases discussing the right to travel ascribe the right's origins to article IV of the Constitution. The court in *Corfield v. Coryell*⁵⁹ defined the privileges and immunities of citizens in the several states as follows:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental The

⁵⁵ ARTICLES OF CONFEDERATION art. IV.

⁵⁶ 254 U.S. 281 (1920).

⁵⁷ *Wheeler*, 254 U.S. 281, 294 (1920). Admittedly, an argument can be made that the Framers' failure to include explicitly the right to travel in the Constitution represents their intent to exclude deliberately the right from federal protection. However, the absence of the right to travel interstate would be abhorrent to the Union the Framers were creating and, aside from the conspicuous absence of the right to travel from the Constitution, no authority exists to support the concept that the Framers wanted to exclude this right. Evidence for the inclusion of the right to travel in article IV, section 2 dates back to 1787 when Charles Pinckney submitted a pamphlet to the federal convention describing article IV, section 2 as follows:

The 4th article, respecting the extending the rights of the Citizens of each State, throughout the United States; the delivery of fugitives from justice, upon demand, and the giving full faith and credit to the records and proceedings of each, is formed exactly upon the principles of the 4th article of the present Confederation, except with this difference, that the demand of the Executive of a State, for any fugitive, criminal offender, shall be complied with.

3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 112 (1934).

⁵⁸ See note 44 and accompanying text *supra*.

⁵⁹ 6 F.Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

right of a citizen of the state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits or otherwise . . . may be mentioned as [one] of the particular privileges and immunities of citizens, which [is] clearly embraced by the general description of privileges deemed to be fundamental⁶⁰

From *Corfield* it seems that the Privileges and Immunities Clause was thought to be an independent source of fundamental rights. Similarly, *Ward v. Maryland*⁶¹ found that the clause "secures and protects the right of a citizen of one State to pass into any other State of the Union . . . without molestation."⁶²

However, subsequent cases, especially the *Slaughter House Cases*,⁶³ indicated that the clause is not a source of fundamental rights but rather is designed to protect certain federalist antidiscrimination notions.⁶⁴ This concept predates the *Slaughter House Cases* as seen in *Paul v. Virginia*⁶⁵ where the Supreme Court said that the purpose of the clause was to "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in

⁶⁰ *Id.* at 551-52. (The district court held that New Jersey could prohibit nonresidents from raking oysters in New Jersey.). The dictum said that the Privileges and Immunities Clause of article IV, section 2 of the Constitution would prevent New Jersey from prohibiting interstate travel itself. See *Right to Travel*, *supra* note 3, at 118.

⁶¹ 79 U.S. (12 Wall.) 418 (1871) (holding unconstitutional under article IV, section 2 Maryland statute requiring nonresidents to obtain licenses to sell goods in the state).

⁶² *Id.* at 430.

⁶³ The *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872) (The Supreme Court referred to the meaning of the Privileges and Immunities Clause in article IV, section 2 in order to shed light on the meaning of the same clause in the Fourteenth Amendment.).

⁶⁴ *Id.* at 77. Article IV, section 2 protects the federalist concepts inherent in a union of states by prohibiting discrimination on the basis of state citizenship. The *Slaughter House Cases* were the first to hold definitively that the clause insures that each state treats equally its citizens and noncitizens present in the state:

[Article IV, section 2] did not create those rights which it called privileges and immunities of citizens of the States

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

Id.

The modern interpretation of the clause is consistent with the view in the *Slaughter House Cases*. See *Shapiro v. Thompson*, 394 U.S. 618, 666 (1969) (Harlan, J., dissenting); See also *Intrastate Residence*, *supra* note 3, at 603.

⁶⁵ 75 U.S. (8 Wall.) 168 (1868).

those States are concerned.”⁶⁶ Moreover, the privileges and immunities secured to the citizens of the several states by the provision were said to be those that the citizens of each state enjoy because of their state citizenship.⁶⁷ In other words, citizens of the United States who are in a specific state but who are not citizens of that state are entitled to the same treatment afforded to the citizens of that state. *Toomer v. Witsell*⁶⁸ clarified this notion by saying that the object of the clause was simply “to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.”⁶⁹

The view that the right to travel comes from article IV, section 2, has fallen somewhat into disfavor.⁷⁰ While the current

⁶⁶ *Id.* at 180. *Paul* held constitutional under the Privileges and Immunities Clause in article IV, section 2 a Virginia statute requiring insurance companies not incorporated under Virginia law to obtain a license in order to carry on business in the state. The Virginia statute did not discriminate against out-of-state corporations because corporations are granted their existence by their state of incorporation. Other states may choose whether or not to recognize the existence of out-of-state corporations. *Id.* at 181. Since the Privileges and Immunities Clause in article IV, section 2 does not mean that citizens of one state carry their privileges of state citizenship with them into another state, the clause does not guarantee the effect of out-of-state incorporation in another state. *Id.* By requiring a license, Virginia simply required the corporation's existence to be recognized in Virginia to the same extent that Virginia recognized businesses incorporated in Virginia. *Id.* The state did not treat its own corporations better than those incorporated elsewhere and therefore did not violate the Constitution. *See id.* at 180-81.

⁶⁷ *Id.*

⁶⁸ 334 U.S. 385 (1948).

⁶⁹ *Id.* at 395. *Toomer* held that a state statute requiring nonresidents engaged in shrimp fishing in South Carolina waters to pay a licensing fee 100 times greater than that paid by residents violated the Privileges and Immunities Clause in article IV, section 2. The Court said the purpose of the Privileges and Immunities Clause “is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.” *Id.* at 398.

⁷⁰ For an early dismissal of article IV, section 2 as the source for the right to travel interstate see *Edwards v. California*, 314 U.S. 160, 180 (1941) (Douglas, J., concurring) (California statute prohibiting the importation of nonresident indigents held invalid as an unconstitutional burden on interstate commerce). Justice Douglas, in his concurring opinion, preferred to decide the case using the fundamental right to travel. He found that article IV, section 2 could not protect interstate movement. Relying, among other cases, on *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868), *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871), and the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 75 (1872), he recognized that the Privileges and Immunities Clause therein protected rights of state citizenship “so that a citizen of one State is not in a ‘condition of alienage when he is within or when he removes to another State.’” *Id.* (quoting *Blake v. McClung*, 172 U.S. 239, 256 (1898)). Instead, Justice Douglas found that, because the right to move from state to state was a right of national citizenship, it had to be protected elsewhere in the Constitution, specifically by the Privileges and Immunities clause in the Fourteenth

view is that the right to travel does not come from this clause,⁷¹ as recently as 1982, Justice O'Connor was willing to remember the roots of the right to travel in the Articles of Confederation and federalist ideals. In a concurring opinion to *Zobel v. Williams*⁷² Justice O'Connor asserted that the source of the right to travel is article IV, section 2. She traced the history of the right of interstate travel from its beginnings through the early judicial precedents and came to the conclusion that "application of the Privileges and Immunities Clause to controversies involving the 'right to travel' would at least begin the task of reuniting this elusive right with the constitutional principles it embodies."⁷³

If history alone were the guideline, article IV would be the clear choice for a source for the right to travel.⁷⁴ And, while judicial reconstruction of the Constitution has changed the nature of the clause,⁷⁵ such interpretive changes should not alter an analysis of the original source of the right.

2. The Fourteenth Amendment's Privileges and Immunities Clause

The Fourteenth Amendment's Privileges and Immunities Clause,⁷⁶ which is interpreted to guarantee the privileges and immunities of national citizenship,⁷⁷ is another possible source for the right to travel. In the *Slaughter House Cases* the Court

Amendment. *Id.* at 179, 181.

⁷¹ See *Intrastate Residence*, *supra* note 3, at 603-04 ("The modern view is that the Privileges and Immunities Clause has no substantive content but merely forbids states from discriminating against citizens of other states."); *Antihomless*, *supra* note 3, at 607 ("The current view holds that Article IV does not protect the right to travel because it merely forbids states from discriminating in favor of their own citizens and has no substantive content of its own."); see also notes 63-69 and accompanying text *supra*.

⁷² 457 U.S. 55, 79 (1982) (O'Connor, J., concurring).

⁷³ *Id.* at 81.

⁷⁴ But see *Edwards*, 314 U.S. at 180-81 (Douglas, J., concurring) (finding the source for the right to travel in the Privileges and Immunities Clause in the Fourteenth Amendment, rather than article IV, section 2). See also note 70 *supra*.

⁷⁵ See discussion of *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), *Toomer v. Witsell*, 334 U.S. 385 (1948), and the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872), in notes 63-69 and accompanying text *supra*. These cases limited the scope of the clause by holding that it protects, rather than creates, rights.

⁷⁶ "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. CONST. amend. XIV, § 1.

⁷⁷ The *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873) (The Fourteenth Amendment's Privileges and Immunities Clause protects the privileges and immunities of the citizens of the United States, not those of the citizens of a state.).

indicated that the right of interstate travel was a privilege of national citizenship.⁷⁸ However, this clause has fallen into disuse because the privileges of national citizenship have been defined very narrowly.⁷⁹ The last attempt to link the right to travel to the clause occurred in 1941.⁸⁰ From a policy standpoint, the Fourteenth Amendment is unlikely to be the sole or original source of the right to travel. Reliance on the Fourteenth Amendment would imply that from 1787, when the Constitution was ratified, until 1868, when the Fourteenth Amendment was adopted, United States citizens did not have the federal right to travel freely from one state to another. That the states could restrict citizens from other states from crossing their borders is contrary to the concept of the Union created by the Constitution and, therefore, unlikely.

3. The Due Process Clauses

Because the right to travel has often been deemed a fundamental personal liberty, the Due Process Clauses of the Fifth⁸¹ and Fourteenth Amendments⁸² have been suggested as sources

⁷⁸ 83 U.S. (16 Wall.) 36 (1873). (Louisiana law granting monopoly to one corporation held constitutional and not a violation of Fourteenth Amendment's Privileges and Immunities Clause that was found to protect the rights to which people are entitled as citizens of the United States and not rights to which people are entitled through their state citizenship).

⁷⁹ See *Right to Travel*, *supra* note 3, at 119 (referring to Privileges and Immunities Clause in Fourteenth Amendment as "dead letter"); *Antihomeless*, *supra* note 3, at 607 (The strict limitation of national citizenship rights makes it "unlikely" that the Fourteenth Amendment's Privileges and Immunities Clause would include the right to travel among them.); notes 63-69 and accompanying text *supra*.

⁸⁰ See *Edwards*, 314 U.S. at 177 (Douglas, J., concurring); *id.* at 181 (Jackson, J., concurring). The concurring Justices agreed with the opinion of the Court that California's statute prohibiting the importation of indigents to the state had violated the Constitution; however, they felt that a right to travel analysis was more appropriate than a Commerce Clause analysis. According to Justice Douglas, "when the Fourteenth Amendment was adopted in 1868, it had been squarely and authoritatively settled that the right to move freely from State to State was a right of *national* citizenship. As such it was protected by the privileges and immunities clause of the Fourteenth Amendment against state interference." *Id.* at 179 (emphasis in original).

Justice Jackson agreed: "This Court should . . . hold squarely that it is a privilege of citizenship of the United States, protected from state abridgement, to enter any state of the Union If national citizenship means less than this, it means nothing." *Id.* at 183.

⁸¹ "No person shall be . . . deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V.

⁸² "No State shall . . . deprive any person of life, liberty, or property, without due

for the right of interstate travel.⁸³ These clauses offer a stronger analysis than other clauses because they have been held to have substantive content.⁸⁴ Still, the Fifth Amendment is not the most likely original source for the right of interstate travel, because the Fifth Amendment has not been used outside the context of international travel and is not a restriction on state power.

Historically, the Fifth Amendment has been used to justify the federal right of United States citizens to travel internationally.⁸⁵ Since the Fifth Amendment is a protection solely from interference by the federal government, it is the logical source for a right to international travel, because only the federal government may pose an obstacle to this right. Yet the Fifth Amendment has also been cited as a possible source for the right of interstate travel.⁸⁶ This interpretation is strongest when the right of interstate travel is characterized as the freedom of movement and as a general aspect of personal liberty.

Practically speaking, the Fifth Amendment is not a strong source for the right of interstate travel. The Fifth Amendment only insures that citizens receive adequate process when the federal government is interfering with personal liberty. Since the Fifth Amendment is not directed at the states, reliance on it for the right of interstate travel indicates that the Framers left the early citizens of the Union unprotected from interference by the states. When dealing with interstate travel, interference by the states is precisely the major concern.

The Fourteenth Amendment's Due Process Clause is also a possible source for the right of interstate travel. While there is a

process of law" U.S. CONST. amend. XIV, § 1.

⁸³ See *Kent v. Dulles*, 357 U.S. 116 (1958) (citing the Fifth Amendment as the source for a right to international travel); *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990) (discussing the Fourteenth Amendment's Due Process Clause among other possible sources for the right to travel interstate).

⁸⁴ See *Loving v. Virginia*, 388 U.S. 1 (1967) (finding the right to marry a substantive right created by the Due Process Clause).

⁸⁵ See *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (The Court invalidated the Secretary of State's regulation denying passports to communists because the "right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.").

⁸⁶ See *Shapiro v. Thompson*, 394 U.S. 618, 669-71 (1969) (Harlan, J. dissenting) ("The last possible source of a right to travel is one which does operate against the Federal Government: the Due Process Clause of the Fifth Amendment.").

history of affording the Due Process Clause substantive content, the coverage of this clause has been severely restricted since the *Lochner* Era's discredited cases.⁸⁷ Recently, the Due Process Clause has again been used as the source for certain fundamental rights, but only within very limited contexts.⁸⁸ However, the Court's recent right to travel cases, without designating a source for the right, use language reminiscent of substantive due process ideals.

*Shapiro v. Thompson*⁸⁹ is the leading case of the modern era dealing with the right to travel. As with most of these modern cases, the Court confronted durational residence requirements. Specifically, people had to reside within the jurisdiction for at least one year in order to receive welfare benefits.⁹⁰ In holding the statutes unconstitutional, the Court found that the statutes burdened the constitutionally protected right of interstate travel, yet the Court explicitly declined to point to the source of this right.⁹¹ However, the Court spoke of personal lib-

⁸⁷ *Lochner v. New York*, 198 U.S. 45 (1905), heralded the finding of certain substantive, fundamental rights created by the Due Process Clause of the Fourteenth Amendment. However, the *Lochner* doctrine was subsequently discredited. See *Nebbia v. New York*, 291 U.S. 502 (1934). The Court then developed a new, more limited approach for establishing substantive due process rights. The test for whether something was fundamental, as articulated by *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), became whether the right was part of the "very essence of a scheme of ordered liberty." While such language may seem vague and subject to broad interpretation, the Supreme Court made it clear in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that it was not going to read this language broadly. In upholding a Georgia law making sodomy a crime, the *Bowers* Court said that the Court "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language and design of the Constitution." *Id.* at 194.

⁸⁸ Today, the cases that do find substantive due process rights have been primarily limited to decisions about family matters or procreation. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (protecting the right for the extended family to live together); *Roe v. Wade*, 410 U.S. 113 (1973) (protecting the right of women to choose to have an abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting the right to use contraceptives).

⁸⁹ 394 U.S. 618 (1969).

⁹⁰ The Court also faced durational residence requirements in *Dunn v. Blumstein*, 405 U.S. 330 (1972), and *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974). In both of these cases the Court dealt with the problem by using a right to travel analysis. See notes 125-32 and accompanying text *infra*. For a durational residence requirement case where the Court distinguished *Shapiro*, *Dunn*, and *Maricopa County*, see *Sosna v. Iowa*, 419 U.S. 393 (1975) (holding that durational residence requirement for a divorce did not unconstitutionally discriminate against persons who exercised their right to travel).

⁹¹ *Shapiro*, 394 U.S. at 630 ("We have no occasion to ascribe the source of this right

erties⁹² and fundamental rights⁹³ in a way that harkened back to substantive due process precedents. Furthermore, Justice Stewart in his concurring opinion stated that the right to travel is an "unconditional personal right."⁹⁴

Finding the source of the right to travel interstate in the Fourteenth Amendment's Due Process Clause suffers from the same defects as finding it in the Privileges and Immunities Clause. Reliance on the Due Process Clause would mean that the first citizens under the Constitution did not have a federally protected right to travel interstate. Thus a state could have denied access to United States citizens coming from out-of-state. Given the Framers' federalist values, such a result is unthinkable.

Overall, however, the Fourteenth Amendment's Due Process Clause could provide a source for the right to travel today, even if it was not the original source from the time of the drafting of the Constitution. The *Shapiro* Court's depiction of the right of interstate travel with language usually reserved for the recognition of substantive due process rights provides support for the proposition that the Fourteenth Amendment's Due Process Clause is a source for the right to travel. This is buttressed by

to travel interstate to a particular constitutional provision.").

⁹² "This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.* at 629.

⁹³ *Id.* at 630-31 (quoting *United States v. Guest*, 383 U.S. 745, 757-58 (1966)):

The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized . . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

⁹⁴ *Id.* at 643 (Stewart, J., concurring). Justice Stewart, by referring to the right to travel as a personal right, used language usually reserved for substantive due process arguments. Yet, he stated that the right to travel interstate is protected by some part of the Constitution other than the Fourteenth Amendment because it is not subject to the regulation and control that accompanies rights found there. *Id.* at 642-43. However, Justice Stewart then explained that only a compelling governmental interest can overcome interference with the right of interstate travel, whether the Court used an equal protection or due process theory from the Fourteenth or Fifth Amendments. *Id.* at 644. Thus, Justice Stewart made only one thing clear: he was not certain what part of the Constitution creates this "unconditional personal right" to travel interstate.

the Court's recent, albeit limited, trend of allowing fundamental rights to emerge from this clause. Therefore, the Due Process Clause of the Fourteenth Amendment remains a viable source for the right to travel interstate.

4. The Commerce Clause

The Supreme Court held that the Commerce Clause⁹⁵ was the source of the right to travel in the Court's first case to present the issue.⁹⁶ Since then, however, the theory has been used sparingly, and not at all since its use in *Edwards v. California*⁹⁷ in 1941. One objection to relying on this clause is that it equates people with commerce. This objection was raised in Justice Jackson's concurring opinion in *Edwards* where he said, "[T]he migrations of a human being . . . do not fit easily into my notions as to what is commerce. To hold that the measure of [this right] is the commerce clause is likely to result either in distorting commercial law or denaturing human rights."⁹⁸

Another important problem with using the Commerce Clause as a source of the right to travel is that the Commerce Clause grants power to Congress. It begins, "Congress shall have Power . . ." Specifically, the Commerce Clause acts as an indirect restraint against the states.⁹⁹ If a state burdens interstate commerce, Congress can regulate against it.¹⁰⁰ Thus, it makes

⁹⁵ "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. CONST. art I, § 8.

⁹⁶ *Smith v. Turner* (The Passenger Cases), 48 U.S. (7 How.) 283 (1849) (declaring unconstitutional state statutes that imposed taxes on nonresidents when they arrived in the ports of the state).

⁹⁷ 314 U.S. 160 (1941). The Court relied on the Commerce Clause as the source for a right of interstate travel in striking down a California law which made it a misdemeanor to bring a nonresident indigent into the state. *Id.* at 173.

⁹⁸ *Id.* at 182 (Jackson, J., concurring).

⁹⁹ See *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948) (invalidating under the Commerce Clause a South Carolina statute requiring owners of shrimp boats fishing in the state's waters to dock at ports in the state and stamp their catch with a tax stamp before shipping or transporting it to another state). "[T]he importance of having commerce between the forty-eight States flow unimpeded by local barriers persuades us that State restrictions inimical to the commerce clause should not be approved . . ." *Id.* at 406.

¹⁰⁰ For example, Congress created the Civil Rights Act under the Commerce Clause to prevent racial discrimination. The Act was upheld even though the impact on interstate commerce that Congress was regulating was arguably slight. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding Civil Rights Act under the Commerce Clause as applied to motel that served out-of-state customers because of the effect on interstate commerce).

little sense to use this clause as the source of a right of the people to be free from governmental interference. Because the Commerce Clause is a grant of power to the Congress, it cannot be a grant of power to the people to travel freely. The problems surrounding the use of this clause as a source for the right to travel combined with the Court's abandonment of it as a source make it an unlikely candidate for the source of the right to travel interstate.

5. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment¹⁰¹ requires consideration as a possible source for the right of interstate travel. Rather than referring to the clause as the actual source for the right, the Supreme Court recognized that it is more accurate to say that the right of interstate travel has been entangled with equal protection analysis.¹⁰² From this perspective, the Equal Protection Clause is not seen as a source for the right to travel.

The Court articulated this entanglement in *Zobel v. Williams*, where it treated the right to travel as a particular application of equal protection analysis.¹⁰³ Applying an equal protection analysis, the Court struck down Alaska's dividend distribution plan because it used length of residence as a guideline and thereby impinged on the fundamental right to travel.¹⁰⁴ More important, the Court noted that the use of an equal protection analysis did not necessarily mean that the Equal Protection Clause was the source of the right to travel.¹⁰⁵

¹⁰¹ "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁰² Rather than springing from the Equal Protection Clause, the right to travel emerges in certain types of cases where people are being treated unequally, and the Court thus employs an equal protection analysis. For example, the Court has dealt in this way with residence requirements that make distinctions between newcomers and longer term residents. See notes 103-05 and accompanying text *infra*.

¹⁰³ *Zobel*, 457 U.S. 55, 60 n.6 (1982).

¹⁰⁴ Even the Court recognized that since the modern era of travel cases that began with *Shapiro*, the Court has been using equal protection analyses to strike down durational residence requirements because they impinge on the fundamental right to travel. *Dunn v. Blumstein*, 405 U.S. 330, 340 (1972) ("In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by 'any classification which serves to penalize the exercise of that right [to travel] . . .'" (emphasis added by *Dunn* Court)).

¹⁰⁵ See *Zobel*, 457 U.S. at 60 n.6 ("In reality, right to travel analysis refers to little more than a particular application of equal protection analysis.").

The Equal Protection Clause is another provision of the Constitution that ordinarily does not confer substantive rights.¹⁰⁶ The clause is aimed only at preventing certain forms of invidious discrimination.¹⁰⁷ Through judicial process, the clause has come to mean that some classifications which are inherently suspect¹⁰⁸ as well as classifications which trigger some free-standing, important constitutional right, require heightened scrutiny.¹⁰⁹ To the extent that the right to travel has been implicated in recent equal protection cases, the Court's holdings have not relied on the use of suspect classifications in order to heighten the judicial scrutiny.¹¹⁰ Thus, the Court relies on the fundamental quality of the right of interstate travel¹¹¹ in requiring heightened scrutiny when this right has been violated.¹¹²

In order for the right to travel to be fundamental, it must have emerged from somewhere else in the Constitution.¹¹³ Thus,

¹⁰⁶ See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring) ("[T]he Equal Protection Clause confers no substantive rights and creates no substantive liberties.").

¹⁰⁷ *Id.* at 28 (Court refused to use heightened scrutiny to review school financing despite appellees' allegation that the system discriminated against a suspect class).

¹⁰⁸ *Id.* (To compel the use of strict scrutiny, the class suffering from discrimination must have some of the "traditional indicia of suspectness.").

¹⁰⁹ See *Graham v. Richardson*, 403 U.S. 365 (1971) ("*Shapiro* was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement."); *San Antonio*, 41 U.S. at 1 (finding that education is not a "fundamental right" which requires the application of the strict standard of review).

¹¹⁰ See *Shapiro*, 394 U.S. at 618, 627 (The Court applied strict scrutiny when it required the states to advance compelling interests to justify the classification between indigents residing in the state for a year or more and indigents residing in the state for less than a year.). See also note 109 *supra*.

¹¹¹ Cf. *United States v. Guest*, 383 U.S. 745, 757 (1966) (The right to travel interstate "occupies a position fundamental to the concept of our Federal Union.").

¹¹² See *Shapiro*, 394 U.S. at 618; *Dunn*, 405 U.S. 330 (1972) (durational residence requirement for voter registration struck down under Equal Protection Clause of Fourteenth Amendment as violating the right of interstate travel); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (state law allowing hospital to refuse to aid indigents who had not resided in the county for one year struck down under the Equal Protection Clause of the Fourteenth Amendment because it violated the right of interstate travel).

¹¹³ See *Lutz v. City of York*, 899 F.2d 255, 265-66 (3d Cir. 1990). The *Lutz* court recognized that simply because right to travel cases have used an equal protection analysis "is not to say that the right to travel itself necessarily arises under the Equal Protection Clause." *Id.* at 265. The court concluded that for the statute under consideration before it to be "deemed constitutionally protected activity [under the Equal Protection Clause], the source of that protection [could] not be the Equal Protection Clause itself." *Id.* at 266.

while equal protection analysis is used in right to travel cases, there is no reason to believe that the Equal Protection Clause is the source of the right to travel.

6. The "Sourceless" Approach

A final approach recognizes the existence of the right to travel interstate without identifying a specific provision as its source. Indeed it seems as if the Supreme Court has given up trying to locate a single source. For example, in *United States v. Guest*¹¹⁴ the Court said, "Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists."¹¹⁵

Because there is such a long tradition of recognizing the right of interstate travel,¹¹⁶ perhaps courts feel it must simply exist. However, since there is no tradition recognizing a federal right of intrastate travel, the "sourceless" approach does little or nothing to help in the search for this intrastate travel right and its origins.

B. *The Existence of the Right of Intrastate Travel*

Precedents for the right of intrastate travel, especially from the Supreme Court, are scarce.¹¹⁷ Therefore, courts must examine the holdings and dicta of interstate travel cases when searching for the right of intrastate travel.¹¹⁸ Such an analysis is

¹¹⁴ 383 U.S. 745 (1966) (This case presented a claim under 18 U.S.C. § 241 (1988), the criminal companion to 42 U.S.C. § 1985(3) (1988)). For a further discussion of *Guest*, see notes 212-18 and accompanying text *infra*.

¹¹⁵ *Guest*, 383 U.S. at 759.

¹¹⁶ *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254 (1974) ("The right of interstate travel has repeatedly been recognized as a basic constitutional freedom.").

¹¹⁷ Early dicta for the existence of the right of intrastate travel can be found in *United States v. Wheeler*, 254 U.S. 280 (1920), where the Court said:

In all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the States to forbid and punish violations of this fundamental right.

Id. at 293.

¹¹⁸ For intrastate travel cases that refer to Supreme Court interstate travel cases, see

illuminating to the extent that it helps discount more sources than it supports. Furthermore, it leads to the conclusion that in order for an intrastate right to exist, it must be independent of an interstate right.¹¹⁹

1. The Supreme Court's Durational Residence Requirement Cases

The most recent line of Supreme Court cases dealing with interstate travel involved durational residence requirements.¹²⁰ These cases have been scrutinized by lower courts grappling with the intrastate issue. In interpreting the Supreme Court cases, the lower courts have split almost equally on whether there is a right of intrastate travel.¹²¹

In nearly all of the recent Supreme Court cases, the Court has characterized the right to travel as the right to travel interstate. In the leading case, *Shapiro v. Thompson*, the Court struck down statutes that required citizens to be state residents

Lutz v. City of York, 899 F.2d 255, 259 (3d Cir. 1990) (discussing *Shapiro*, *Dunn*, *Mari-copa County* and *Zobel*); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971) (discussing *Shapiro*); Cole v. Housing Auth. of Newport, 435 F.2d 807, 809 (1st Cir. 1970) (discussing *Shapiro*). See note 121 *infra*.

¹¹⁹ See notes 188-90 and accompanying text *infra*.

¹²⁰ See note 118 and accompanying text *supra*.

¹²¹ See notes 142-71 and accompanying text *infra*. The First Circuit implicitly recognized the right of intrastate travel by striking down a residence requirement as applied to people moving their residences within the state. *Cole v. Housing Auth. of Newport*, 435 F.2d 807 (1st Cir. 1970). The Second Circuit realized the impact of the First Circuit's holding and explicitly recognized the right of intrastate travel in a factually similar case. *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971). Most recently, the Third Circuit, in a case outside the residence requirement context, established a right of intrastate travel. *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990) (The court considered the right to travel intrastate in its decision to uphold an anticruising ordinance.).

On the other hand, the Fifth, Sixth and Seventh Circuits have refused to recognize the right of intrastate travel. The Fifth Circuit explicitly found *Shapiro* and *Dunn* inapplicable as interstate travel cases. *Wright v. City of Jackson, Mississippi*, 506 F.2d 900, 902 (5th Cir. 1975). The Sixth Circuit said it could find no support in the constitution for a right of intrastate travel. *Wardwell v. Board of Educ.*, 529 F.2d 625, 627 (6th Cir. 1976). The Seventh Circuit refused to consider the right of intrastate travel beyond the context of a durational residence requirement. Since the court determined that the case before it did not involve a durational residence requirement, the court did not have to consider whether the right to travel intrastate existed. *Andre v. Board of Trustees of Village of Maywood*, 561 F.2d 48, 53 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (The court distinguished the residence requirement in a village ordinance as a nondurational and therefore "bona fide" residence requirement.).

for at least one year before they could be eligible for welfare benefits.¹²² The Court found that the statutes impermissibly inhibited migration by needy persons "into the State."¹²³ Thus, the Court found that a right of interstate travel existed and that the statutes in question interfered with this right. The Court relied on the concepts of federalism and personal liberty to support its recognition of this right.¹²⁴

In *Dunn v. Blumstein* the Court struck down a Tennessee law that required residence in the state for one year and in the county for three months as prerequisites for voter registration.¹²⁵ Because the Court found that the requirement penalized those persons who had recently exercised their right to travel, the Court used heightened scrutiny and struck down the law under an equal protection analysis.¹²⁶ The Court noted that actual deterrence of travel need not be proven; instead the law must undergo strict scrutiny if it "'operates to penalize those persons, and only those persons, who have exercised their constitutional right of interstate migration.'" ¹²⁷ The Court did not address the deterrent effect the law might have had on intrastate migration.

The right of intrastate travel was finally mentioned by the Justices who decided *Memorial Hospital v. Maricopa County*,¹²⁸ but the Court left undecided the possibility of a constitutional distinction between interstate and intrastate travel.¹²⁹ In *Maricopa County* the appellant had been denied medical care because he had not resided for one year in the county, as was required by Arizona law.¹³⁰ The Court was able to strike down the statute without construing it to apply only to intrastate migrants by reading it to include people who moved to the county

¹²² *Shapiro*, 394 U.S. 618, 642 (1969).

¹²³ *Id.* at 629.

¹²⁴ "This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land" *Id.*

¹²⁵ *Dunn*, 405 U.S. 330, 331 (1972).

¹²⁶ *Id.* at 338.

¹²⁷ *Id.* at 341 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (Brennan, White and Marshall, JJ., dissenting)) (emphasis added).

¹²⁸ 415 U.S. 250 (1974).

¹²⁹ "Even were we to draw a constitutional distinction between interstate and intrastate travel, a question we do not now consider, such a distinction would not support the judgment of the Arizona court in the case before us." *Id.* at 255-56.

¹³⁰ *Id.* at 251-52.

from out-of-state. Here the Court seemed to be following the lead of the Arizona Supreme Court.¹³¹ However, the Court did address this argument in a footnote and found it "inconsistent to argue that the residence requirement should be construed to bar longtime Arizona residents, even if unconstitutional as applied to persons migrating into Maricopa County from outside the State."¹³²

More recently, in *Zobel v. Williams*,¹³³ the Court struck down an Alaska benefits distribution plan as violating the Equal Protection Clause. Alaska had established a benefits fund from a portion of its mineral income.¹³⁴ The plan distributed income from the fund unequally, giving a higher percentage to people who had lived in Alaska longer.¹³⁵ The Court found that underlying this scheme was the notion that some citizens would be "more equal than others" and thus the statute impermissibly discriminated.¹³⁶ The majority opinion did not reach its conclusion on the basis of the right of interstate travel. Rather, the Court found the right to travel issue was subsumed into an equal protection analysis.¹³⁷ The Court recognized the existence of the right and noted that its source remained obscure but found that the case before it was distinguishable from previous right to travel cases.¹³⁸ Since Alaska's scheme distinguished between residents based on when they arrived in the state, it treated some state citizens differently than others and therefore was subject

¹³¹ *Id.* at 256.

¹³² *Id.* at 256 n.9.

The Court seemed to suggest that it makes no sense to allow people who came from out-of-state to escape the residence requirements, considering that people who had always resided in the state, but had just recently moved into the county, received no benefit from their allegiance to the state simply because they had not traveled interstate. *Id.* Other courts have recognized that the right of intrastate travel would eliminate the apparent injustice of this inconsistency. The Second Circuit, in *King v. New Rochelle Mun. Hous. Auth.*, chose to remedy the inconsistency by recognizing the right to travel intrastate. 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971). See also notes 148-52 and accompanying text *infra*.

¹³³ 457 U.S. 55 (1982).

¹³⁴ *Id.*

¹³⁵ *Id.* at 56.

¹³⁶ *Id.* at 71.

¹³⁷ "In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." *Id.* at 60 n.6.

¹³⁸ *Id.*

to equal protection analysis.¹³⁹

Justice O'Connor's concurring opinion, however, did recognize that the right to travel interstate was implicated by the distribution plan. Her reading of the precedents revealed that the Court struck down statutes that rewarded long-term state citizens, not because such rewards would be impermissible under the Equal Protection Clause, but only because "[their] implementation would abridge an interest in interstate travel or migration."¹⁴⁰ Justice O'Connor then conducted her own analysis, which would have struck down the law as an infringement of the right to travel which she found to be guaranteed by the Privileges and Immunities Clause in article IV.¹⁴¹ Since she derived the right to travel from the Privileges and Immunities Clause, she applied the test used for privileges and immunities cases. She found that the law must be struck down because it denied people who came from outside the state the same privileges as others in the state.¹⁴²

While the holdings in these cases do not provide much guidance for finding an intrastate right to travel, the language used in these cases and in earlier precedents does provide by analogy possible sources for the right of intrastate travel. The provisions of the Constitution discussed as sources for the right of interstate travel are not surprisingly the same ones that have been used by the lower courts that have dealt with the intrastate travel issue.

2. Sources of the Right of Intrastate Travel

The following examination of federal courts of appeals cases addressing the right of intrastate travel will show how courts have dealt with recent and older interstate travel cases in an attempt to establish the source and existence of an intrastate right. Although there is no consensus about the constitutional source of the right of interstate travel, there is unanimous agreement that the right actually exists. When discussing intrastate travel, one must bear in mind that there is no consensus as to whether there even is such a federally protected right, let alone

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 72-73 (O'Connor, J., concurring).

¹⁴¹ *Id.* at 73-81.

¹⁴² *Id.* at 74-75.

from which constitutional provision it emerges. The following analysis will lead to the conclusion that the right of intrastate travel does exist, and its source is the Fourteenth Amendment's Due Process Clause.

The first case to actually establish a right of intrastate travel was the 1970 First Circuit case *Cole v. Housing Authority of Newport*.¹⁴³ This case presented a city durational residence requirement for admission to public housing.¹⁴⁴ The *Cole* court found that the statute violated the Equal Protection Clause and thus struck it down as applied to both new residents who had moved within the state and those who had moved from out-of-state.¹⁴⁵ The court did not explicitly articulate a right of intrastate travel, and therefore it did not point to a particular source for the right. However, in striking down the statute as applied to the newcomers to the city who moved from within the state, it could be argued that the court was implicitly recognizing a right of intrastate travel without delving into any of the legal issues that such a formal finding would involve.¹⁴⁶ This implicit finding in *Cole* did not go unnoticed when the Second Circuit dealt with a factually indistinguishable case. In *King v. New Rochelle Municipal Housing Authority*¹⁴⁷ the Second Circuit cited *Cole* in order to invalidate under equal protection analysis a resolution requiring people to live in New Rochelle for five years before becoming eligible for public housing, because the resolution impinged on the right to travel.¹⁴⁸ The Second Circuit adopted the *Cole* court's analysis and, even though it claimed to only present a general description of its reasoning, choosing to rely on *Cole* for the fine points, the *King* court dealt more thoroughly with the issue.¹⁴⁹

The Second Circuit in *King* undertook a brief analysis of

¹⁴³ 435 F.2d 807 (1st Cir. 1970).

¹⁴⁴ *Id.* at 808. The regulations of the Newport Housing Authority, § 11(A)(4)(e), required that applicants for public housing reside in Newport for at least two years. *Cole v. Housing Auth. of Newport*, 312 F. Supp. 692, 695 (D.R.I. 1970).

¹⁴⁵ *Cole*, 435 F.2d at 813.

¹⁴⁶ See *Intrastate Residence*, *supra* note 3, at 608-09 (discussing *Cole* as upholding a right of intrastate travel).

¹⁴⁷ 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971).

¹⁴⁸ *Id.* at 648.

¹⁴⁹ *Id.* ("Although we reach our result independently of the First Circuit, we adopt that court's reasoning on the finer points involved and present in this opinion only the broad fabric of our approach.").

Shapiro, the Supreme Court's leading durational residence requirement case. The *King* court noted that in *Shapiro*, the Supreme Court had specifically refused to try to find a source for the right to travel and had instead relied on the importance of the right to the constitutional concept of personal liberty.¹⁵⁰ Thus, the Second Circuit was satisfied that the right to travel existed.¹⁵¹ From that point the court was able to leap to the existence of an intrastate right within this general, all-encompassing right to travel with one sentence: "It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."¹⁵² Even though the court did not find a source for the right, with this statement the right of intrastate travel obtained its first official recognition.

After *King* the right of intrastate travel did not gain immediate acceptance. In fact, other circuits avoided the intrastate issue or found that the right did not exist. For example, the Fifth Circuit in *Wright v. City of Jackson, Mississippi*¹⁵³ gave little consideration to the possibility of a right of intrastate travel when it upheld a city ordinance requiring city employees to live within the city. The plaintiffs were a class of nonresident firemen who challenged the ordinance as, among other things, a violation of their right to travel. The Fifth Circuit reviewed the "*Shapiro-Dunn*"¹⁵⁴ line of reasoning and found that since it dealt exclusively with interstate travel it was inapplicable to *Wright*, because *Wright* dealt with a continual residency re-

¹⁵⁰ *Id.*

¹⁵¹ The *King* court looked to *Shapiro* for guidance and found the case applicable even though it only dealt with interstate travel. The *King* court found the Supreme Court's exclusive use of the word "interstate" in its analysis to be a reflection of the facts of that case. *Id.* The Second Circuit noted that the Supreme Court's refusal to find a specific source for the right supported its view that *Shapiro* could be applied beyond the interstate travel context. *Id.* Especially since the *Shapiro* Court rested its holding on "constitutional concepts of personal liberty," the Second Circuit could and did find that the right of intrastate travel arose from the same notions of liberty. *Id.* (quoting *Shapiro*, 394 U.S. at 629).

¹⁵² *Id.*

¹⁵³ 506 F.2d 900 (5th Cir. 1975).

¹⁵⁴ *Id.* at 902. In 1972 the Supreme Court decided *Dunn v. Blumstein* in which it elaborated upon its view on the right to travel interstate. 405 U.S. 330 (1972). *Shapiro* and *Dunn* were the Supreme Court's only cases discussing the right to travel interstate in 1975 when the Fifth Circuit decided *Wright*.

quirement and therefore implicated intrastate travel.¹⁵⁵ The plaintiffs argued that there was no logical distinction between interstate and intrastate travel.¹⁵⁶ The Fifth Circuit disagreed, saying "that such application would substantially distort the principles of *Shapiro* and *Dunn*, and the reasons for those decisions."¹⁵⁷

The *Wright* court explained its reasoning by noting that *Shapiro* invalidated only the durational requirement. The residency requirement was not likewise unconstitutional. The prerequisite that welfare recipients reside for one year in the state penalized those people who had recently exercised their right to travel. Requiring those people to be state residents, regardless of how long, in order to reap benefits from the state, was a distinct and valid way to reward people within the state.¹⁵⁸

In *Wardwell v. Board of Education of City School District* the Sixth Circuit expressly found no support for a constitution-

¹⁵⁵ *Wright*, 506 F.2d at 902. A continual residency requirement mandates only residency in a certain place for entitlement to benefits. A durational residency requirement uses length of residency to determine who is entitled to benefits.

A durational residency requirement therefore treats citizens of a state differently based on how long they have resided in the state or somewhere within the state. This classification penalizes people who have recently traveled and therefore can deter both interstate and intrastate travel, because it creates a waiting period before a traveler can qualify for benefits. However, only the interference with the interstate travel right has caused the Supreme Court to raise the level of scrutiny and invalidate such requirements. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

A continual residency requirement, such as the one in *Wright*, does not classify state citizens differently depending on whether they have recently traveled interstate. Someone who moves to the city from out-of-state is treated the same as someone who moves to the city from within the state. Therefore the ordinance in *Wright* did not penalize people for exercising their right of interstate travel. However, the ordinance did implicate the right of intrastate travel because it required employees to be citizens of a particular city within the state.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* The *Wright* court also explained how the Supreme Court in *Dunn* reaffirmed the position it took in *Shapiro*. See *id.* In *Dunn* the Court struck down the durational portion of a residency requirement for voting but found that nothing in its holding was "meant to cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements." *Dunn*, 405 U.S. 330, 342 n.13.

In other words, durational residence requirements violate the Equal Protection Clause because they result in the different treatment of citizens of the same state through their impact on the right to travel interstate. On the other hand, general residence requirements, which merely require that people be citizens of the state, do not treat citizens of the same state differently.

ally protected right of intrastate travel.¹⁵⁹ In *Wardwell* the court upheld the board of education's rule that required all newly hired teachers in Cincinnati schools to establish residency in the city school district within ninety days of employment.¹⁶⁰ The plaintiff in that case lived in Ohio but outside the school district and failed to move as required by the rule.¹⁶¹ The Sixth Circuit's reading of *Shapiro*, *Dunn* and *Maricopa County*¹⁶² convinced the court that the only fundamental right recognized by those cases was the right of interstate travel.¹⁶³ The *Wardwell* court found that the rule in question imposed only a continuing or "bona fide" residence requirement which did not burden the right to travel because travel meant more than just movement.¹⁶⁴ Finding no fundamental interest at stake, the court used the minimum scrutiny analysis which requires only that the state have a rational basis for the rule.¹⁶⁵ The Sixth Circuit found that the rule passed the much easier test.¹⁶⁶

¹⁵⁹ *Wardwell*, 529 F.2d 625, 627 (6th Cir. 1976) ("We find no support for plaintiff's theory that the right to intrastate travel has been afforded federal constitutional protection.").

¹⁶⁰ *Id.* at 629.

¹⁶¹ *Id.* at 626.

¹⁶² *Id.* at 627. *Maricopa County* was the most recent word on the right to travel in the durational residence requirements context at the time when the Sixth Circuit was considering *Wardwell*. See *Maricopa County*, 415 U.S. 250 (1974). Thus the *Wardwell* Court added *Maricopa County* to the *Shapiro-Dunn* case line and discussed this new case at length. Like the Fifth Circuit in *Wright*, see note 158 *supra*, the Sixth Circuit found that the Supreme Court cases applied to durational and not bona fide continuing residence requirements. *Wardwell*, 529 F.2d at 627.

¹⁶³ *Id.* The *Wardwell* court stated that its "conclusion [was] that *Shapiro* and the other right to travel cases are not applicable to intrastate travel and continuing employee residency requirements" *Id.* (emphasis in original). This language could mean that the court did not believe there is a right of intrastate travel. However, the *Wardwell* court did not explicitly find that the right of intrastate travel does not exist. In fact the court said, "where, as in the present case, a continuing residency requirement affecting at most the right of intrastate travel is involved, the 'rational basis' test is the touchstone to determine its validity." *Id.* at 628 (emphasis in original). This language implies that the right does exist. The court seemed to rest its decision on the type of residency requirement (continuing as opposed to durational), rather than on its impact on the right to travel.

¹⁶⁴ *Id.* at 627. "Later, in invalidating a durational residence requirement for voter registration on the basis of *Shapiro*, [the Supreme Court] cautioned that [its] decision was not intended to 'cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements.'" *Id.* (quoting *Dunn v. Blumstein*, 405 U.S. 330, 342 n.13 (1972)).

¹⁶⁵ *Id.* at 628.

¹⁶⁶ *Id.*

The Seventh Circuit found it unnecessary to consider an intrastate travel claim in *Andre v. Board of Trustees of Village of Maywood*.¹⁶⁷ *Andre* involved a challenge to an ordinance that required all department heads and administrative personnel to establish residency in Maywood within two years; it required all other employees to establish Maywood residency within four years.¹⁶⁸ The plaintiffs, municipal employees, challenged the residency requirement as a violation of equal protection and urged the application of the strict scrutiny test because the ordinance infringed on their fundamental right to travel interstate and intrastate.¹⁶⁹ The court, relying on *Dunn*, held that the ordinance did not violate the right of interstate travel, because the residence requirement was continuing or "bona fide" and not durational.¹⁷⁰ As for the plaintiffs' intrastate claim, the court said that "[t]he claimed right of intrastate travel has been rejected by several courts."¹⁷¹

The Seventh Circuit did at least admit the *King* court's recognition of the right¹⁷² but found the *King* decision limited to durational residence requirements.¹⁷³ The *Andre* opinion suggested that the right found in *King* could be limited to the regulatory context in which it arose.¹⁷⁴ Even though the *Andre* court

¹⁶⁷ 561 F.2d 48 (7th Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

¹⁶⁸ *Id.* at 49.

¹⁶⁹ *Id.* at 52. Under a strict scrutiny test, legislation will be upheld only if it is necessary to serve a compelling state interest. *Id.*

¹⁷⁰ *Id.* The ordinance did not impose a durational requirement because it did not require plaintiffs to live in the village for a specific period of time before qualifying for some benefit. Plaintiffs were eligible to work for the village so long as they continued to live there. *Id.* at 49.

¹⁷¹ *Id.* at 53 (citing *Wright v. City of Jackson, Mississippi*, 506 F.2d 900 (5th Cir. 1975) (holding that *Shapiro* and *Dunn* apply only to interstate travel); *Abraham v. Civil Service Comm'n*, 65 N.J. 61, 319 A.2d 483 (1974) (upholding continuing residence requirement as a condition of employment by the city); *Ector v. City of Torrance*, 10 Cal. 3d 129, 514 P.2d 433 (1973), *cert. denied*, 415 U.S. 935 (1974) (charter provision requiring residence of municipal employees within city limits is not unconstitutional)).

¹⁷² *Id.* (noting that *King* and other cases "recognizing a fundamental right of intrastate travel have done so vis-a-vis durational residence requirements").

¹⁷³ *Id.*

¹⁷⁴ The Second Circuit in *King* recognized the right of intrastate travel in order to avoid the inconsistency that would arise if the residence requirement had been held unconstitutional as applied to interstate migrants but upheld as applied to people moving within the state. *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 n.6 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971). The *Andre* Court, by distinguishing *King* as a durational residence requirement case, implied that *King's* holding with respect to the intrastate travel component was peculiar to the facts of the case and was not general

was in no way bound by the *King* decision, the *Andre* court could dismiss *King*'s recognition of the right of intrastate travel as a result peculiar to the facts of that case and the Second Circuit's inability to separate the intrastate from the interstate impact of the residence requirement.¹⁷⁵

Most recently, the Third Circuit, in *Lutz v. City of York*, expressly recognized the right of intrastate travel.¹⁷⁶ In that case the plaintiffs challenged an "anti-cruising" ordinance prohibiting unnecessary repeated driving over public roads.¹⁷⁷ The court declined to use strict scrutiny and upheld the ordinance even though it found the ordinance burdened the fundamental right to travel intrastate.¹⁷⁸

The *Lutz* court, unlike the Second Circuit in *Spencer*, felt obligated to point to a source for the right of intrastate travel to justify recognizing that right. The Third Circuit's analysis included a discussion of *Shapiro* and its progeny.¹⁷⁹ It also cited *King* as authority for the right of intrastate travel.¹⁸⁰ The court was not satisfied that by tracing these modern cases it could legitimately proclaim the existence of this nascent right.¹⁸¹ Indeed when the court cited *King* it expressed its dissatisfaction with *King*'s precedential value. The court said, "Although we ultimately agree with the Second Circuit's result, we find its reasoning somewhat underarticulated, especially in light of the travel

authority for the existence of the right to travel intrastate. See *Intrastate Residence*, *supra* note 3, at 609.

¹⁷⁵ See *Intrastate Residence*, *supra* note 3, at 609 n.106.

However, the *King* decision was resurrected by the *Spencer* court when it held that the right to travel intrastate exists and can be asserted as the underlying federal right in a civil rights claim. 903 F.2d 171, 174 (2d Cir. 1990).

¹⁷⁶ *Lutz*, 899 F.2d 255 (3d Cir. 1990). The Third Circuit's reasoning is highly relevant to a search for the source of a right of intrastate travel since the court conducted an extensive analysis of its own.

¹⁷⁷ *Id.* at 256-57.

¹⁷⁸ *Id.* at 269-70.

¹⁷⁹ *Id.* at 258-59. As cited in *Lutz*, *Shapiro*'s progeny includes: *Dunn v. Blumstein*, 405 U.S. 330 (1972) (which struck down durational residence requirement for voter qualification using equal protection analysis and the right to travel interstate); *Memorial Hosp. v. Maricopa County*, 414 U.S. 250 (1974) (which held unconstitutional a durational residence requirement for medical care eligibility without considering intrastate impact of the law); *Zobel v. Williams*, 457 U.S. 55 (1982) (Court used a mix of right to travel and equal protection analysis to invalidate a benefit distribution plan that used length of residence in the state to determine amount of benefits).

¹⁸⁰ *Lutz*, 899 F.2d at 261.

¹⁸¹ *Id.* at 259.

cases decided since *King*.¹⁸² The Third Circuit then embarked on the course of identifying and evaluating all the possible sources for a right of intrastate travel. The court eliminated all the possibilities except the Fourteenth Amendment's Due Process Clause.¹⁸³ The court then concluded that the Due Process Clause in the Fourteenth Amendment is the source of the right of intrastate travel.

In its consideration of Fourteenth Amendment substantive due process, the Third Circuit relied on an older line of cases

¹⁸² *Id.* at 261. Apparently the Third Circuit was not only concerned that *King* had never fully explained how and where it found the right of intrastate travel but it was also concerned that cases like *Wright*, *Wardwell* and *Andre* had explicitly chosen not to find a right of intrastate travel. See notes 153-75 and accompanying text *supra*.

¹⁸³ The *Lutz* court clearly articulated its reasoning when it eliminated possible sources for the right of intrastate travel. First, the court concluded that the article IV Privileges and Immunities Clause could be the source of the right of interstate but not intrastate travel because the clause protects discrimination on the basis of state citizenship. 899 F.2d at 262; see also *Toomer v. Witsell*, 334 U.S. 385 (1948) (which struck down a state statute that discriminated against nonresidents as violating article IV, section 2); notes 63-69 and accompanying text *supra*. Since the ordinance in *Lutz* treated everyone driving on the local roads equally, regardless of their state citizenship, the ordinance could only be a restriction on intrastate travel and therefore did not implicate article IV, section 2. 899 F.2d at 262.

The court then eliminated the Privileges and Immunities Clause of the Fourteenth Amendment because the clause had fallen into disuse and because the clause protects, rather than creates, certain rights of national citizenship. *Id.* at 263-64; see also *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (The only rights protected by this clause are those "which owe their existence to the Federal government, its national character, its Constitution, or its laws."); notes 77-80 and accompanying text *supra*. The court also determined that insofar as the right to travel interstate has been designated a right of national citizenship, it only applies in the context of travel necessary for the transaction of business with the national government. *Lutz*, 899 F.2d at 264 (citing *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) (which struck down a tax imposed on all persons leaving the state by railroad because it inhibited citizens from going to the seat of the national government)). According to the court, any extension of this right to travel to transact business with the national government into a general right to free movement has been discredited, making it unlikely that the Privileges and Immunities Clause of the Fourteenth Amendment is the source of the intrastate right. *Id.* at 264-65 (citing *United States v. Wheeler*, 254 U.S. 281 (1920) (Members of a conspiracy who forcibly removed persons from their state of residence to another state and threatened them with bodily harm should they ever return could not be criminally punished under federal law; freedom of movement is within the authority of the states to enforce.)).

Next, the court found the Commerce Clause was not the source for the right of intrastate travel by relying on its disuse as a source and by explaining that under commerce theory the ordinance would be upheld. *Lutz*, 899 F.2d at 265. The Equal Protection Clause also could not be the source for the right, according to the court, because the clause does not create substantive rights. *Id.* at 265-66; see also notes 101-13 and accompanying text *supra*.

containing useful dicta suggesting that there was a right to move about freely that is part of personal liberty.¹⁸⁴ The court recognized, however, that these early cases had subsequently been questioned because of their link to the *Lochner* Era cases, and that although today the Supreme Court does find new fundamental rights in the Due Process Clause, it has become increasingly hesitant to do so.¹⁸⁵ In the end, the Third Circuit decided that the Supreme Court's hesitation was not a good enough reason to preclude the use of the Due Process Clause, and the court determined that the clause applied because "the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'"¹⁸⁶ Thus, the Third Circuit declared that a right of intrastate travel exists and that the only possible source for that right is the substantive due process guaranteed by the Fourteenth Amendment.¹⁸⁷

By process of elimination and reliance on the importance of the right of intrastate travel to the concept of personal liberty, the *Lutz* analysis demonstrated the source of the right of intrastate travel is the Fourteenth Amendment's Due Process Clause. This clause has a major advantage over the other possible sources because it creates substantive rights.

Moreover, because the right of intrastate travel is so fundamental that it is hard to conceive of it not being protected by the Constitution, the argument that it can be found within substantive due process is appealing. Substantive due process protects rights that flow naturally from a concept of liberty, and the right to travel has often been characterized as a freedom of

¹⁸⁴ *Lutz*, 899 F.2d at 266 (citing *Williams v. Fears*, 179 U.S. 270 (1900) (holding constitutional a Georgia revenue act that levied a tax on persons hiring laborers to work outside the state)). While the *Lutz* court referred to a "line of cases," the court only mentioned *Williams*. *Id.* The Third Circuit justified the exclusion of the other cases by saying that *Williams* was the clearest. *Id.*

¹⁸⁵ *Id.* at 267 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Supreme Court upheld Georgia sodomy law and refused to find that any fundamental rights were violated by the law)).

¹⁸⁶ *Id.* at 268 (citations omitted). The court was uncertain that its judgment was foolproof, but since the Supreme Court had not repudiated substantive due process and had not answered the question it left open in *Maricopa County*, the Third Circuit thought that there was room for argument. See *Memorial Hosp. v. Maricopa County*, 416 U.S. 250 (1974) (the Court decided not to consider whether there is a distinction between the rights of interstate and intrastate travel).

¹⁸⁷ *Lutz*, 899 F.2d at 268.

movement necessary for the enjoyment of liberty.¹⁸⁸ The right to travel intrastate is an important part of the freedom of movement which is an important aspect of personal liberty. The freedom of movement would be meaningless without the right to be free from governmental intrusion when traveling from one place to another within a state.

Even though the Fourteenth Amendment cannot be the original source of the right to travel because it post-dates the Constitution, it can still be the source for the right of intrastate travel. The rights of interstate and intrastate travel need not come from the same constitutional source. Although article IV seems to be the source of the right of interstate travel,¹⁸⁹ a right of intrastate travel may well have a source independent of the article IV source for interstate travel, especially considering that the Framers were motivated by federalist concerns.¹⁹⁰ The Framers appear to have been more worried that each state would restrict the movement by citizens over its borders. Only after the Union was stable did people have to worry about other freedoms that had to be insured within the states. These freedoms are embodied by substantive due process, and the right of intrastate travel is among them.¹⁹¹

¹⁸⁸ See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (The Court referred to "the constitutional right to a freedom of movement" potentially implicated by an antiloitering statute.); *Kent v. Dulles*, 357 U.S. 116, 126 (1958) ("Freedom of movement is basic in our scheme of values."); *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (The right to move at will within one's state is a right inherent in citizens of all free governments.); *Williams v. Fears*, 179 U.S. 270, 274 (1900) ("Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty . . .").

¹⁸⁹ According to this Comment, article IV, section 2 is most likely the original source of the right of interstate travel. See notes 53-74 and accompanying text *supra*.

¹⁹⁰ See *Lutz*, 899 F.2d at 261; *Intrastate Residence*, *supra* note 3, at 608 ("There is also no reason why an independent intrastate right, in the nature of a personal freedom supported by the due process . . . clause[s], could not exist simultaneously with an interstate right implied by the Constitution as a whole.").

¹⁹¹ See note 183 *supra*. The Supreme Court has not abolished Fourteenth Amendment substantive due process; it has only indicated that not everything will be so fundamental that it is protected by that provision. See *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Bowers* can easily be distinguished from the right to travel intrastate. The petitioners in *Bowers* believed that a Georgia law making sodomy a crime was an unconstitutional violation of privacy. *Id.* In refusing to invalidate the Georgia law, it can be argued that the Court was refusing to stretch the concept of privacy any further. The right of intrastate travel does not rest on notions of privacy. Therefore, the Court's hesitation in *Bowers* may not apply to finding the right of intrastate travel to be protected by substantive due process.

C. Section 1985(3) and Its Application to *Spencer*

The Second Circuit found the Spencers' claim actionable under title 42, section 1985(3) of the United States Code. The claimed deprivation of Spencer's right to travel intrastate was asserted as the fundamental right which was deprived by the conspiracy that violated the statute. This final section of the analysis focuses on how the infringement of this right must comport with the application of the statute as it has come to be interpreted by the Supreme Court. The Second Circuit failed to perform this analysis adequately; the analysis is far more complicated than the court seemed willing to admit. The Second Circuit incorrectly held that the plaintiffs' claim was actionable because the court did not find that state action was a necessary component of plaintiffs' claim under section 1985(3).

1. History of Section 1985(3)

The history of section 1985(3) is important for an understanding of *Spencer* for two reasons. First, the motivation of the drafters of the statute illuminates whether they were trying to combat the type of racial conflict presented by the *Spencer* case. Second, the members of the Congress which enacted the statute expressed reservations about their power to enact it and also expressed fears that the statute would be so all-encompassing that it would become a general tort law.¹⁹² Both of these fears have affected the way the statute has been interpreted by the judiciary.

The Civil Rights Act of 1871 contained the precursor to today's section 1985(3).¹⁹³ The Act was the product of a Recon-

¹⁹² Representative (later President) James Garfield argued:

[T]he section needed to be tempered by a limiting provision. Not every run-of-the-mill conspiracy should be swept under federal law; the bill should be limited to private conspiracies aimed at particular *classes* of citizens; its application should be limited to conspiracies that sought to strip from certain classes of individuals the *equal protection* of the laws. If the bill were revised to reach only invidious conspiracies of the sort entered into by the Ku Klux Klan - rather than *every* pact between two people to murder, rob, assault, commit perjury, and so forth - then Garfield would lend his full support to the bill.

CONG. GLOBE, 42d Cong., 1st Sess. 153-54 (1871).

¹⁹³ See McDonald, *Starting from Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus*, 19 CONN. L. REV. 471 (1987) ("[T]here is probably no other federal statute in such complete disarray, distortion, and confusion as that section of the Civil Rights Act of 1871 now codified at 42 U.S.C. § 1985(3).").

struction Congress attempting to deal with the new racial problems left behind by the Civil War and the emancipation of the slaves.¹⁹⁴ Also known as the Ku Klux Klan Act, the Act was specifically designed to combat the acts of violence for which the newly formed Klan had already become notorious.¹⁹⁵

When the House of Representatives first proposed the Civil Rights Act it contained several sections, the second of which eventually became the modern conspiracy statute, section 1985(3).¹⁹⁶ Initially, section 2 of the Act provided criminal punishment to private individuals who conspired to deprive others of their constitutional rights.¹⁹⁷ The original second section was questioned by a sizable opposition which believed it was beyond the scope of congressional law-making power.¹⁹⁸ Those opposed to section 2 also voiced concern that "every backyard conspiracy between two individuals would be a violation of federal law."¹⁹⁹

¹⁹⁴ See CONG. GLOBE, *supra* note 192, at 155.

¹⁹⁵ *Id.* at 443. See also Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 533 (1985) (relating history of § 1985(3)).

¹⁹⁶ 42 U.S.C. § 1985, Historical Note (1988) (Act of April 20, 1871, ch. 22, §2, 17 Stat. 13).

¹⁹⁷ The text of section 2 provided that:

[I]f two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation or perjury, criminal obstruction of legal process, or resistance of officers in discharge of official duty, arson, or larceny, and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and upon conviction thereof shall be liable to a penalty of not exceeding \$10,000, or to imprisonment not exceeding ten years, or both, at the discretion of the court; provided, that if any party or parties to such conspiracy or combination shall, in furtherance of such common design, commit the crime of murder, such party or parties so guilty shall, upon conviction thereof, suffer death; and provided also, that any offense punishable under this act, begun in one judicial district of the United States and completed in another, may be dealt with, inquired of, tried, determined, and punished in either district.

CONG. GLOBE, *supra* note 192, at 317.

¹⁹⁸ *Id.* at 412-15. See also McDonald, *supra* note 193, at 481 (The opposition was concerned that section 2 invaded the states' jurisdiction over criminal acts.).

¹⁹⁹ Gormley, *supra*, note 195, at 537. Representative (later President) Garfield made a famous speech during the debates in which he said:

Section 2 was subsequently amended to remedy the problems suggested by those who opposed it. The amendment eliminated the list of crimes and restricted the reach of civil conspiracies to those that deprived "any person or class of persons of equal protection and equal privileges and immunities under the laws."²⁰⁰ This amended version was enacted by Congress. Later, section 2 was recodified into three separate statutes, one of which is the modern civil conspiracy statute embodied in section 1985(3).²⁰¹

2. Early Judicial Interpretation

What is today codified as section 1985(3) received little judicial attention after its enactment in 1871. The post-Civil War Court was quick to indicate its unwillingness to allow Congress to guard civil rights at the federal level.²⁰² In 1882 the Court struck down one of the criminal provisions of the "Ku Klux Klan Act" as unconstitutional, holding that Congress lacked the authority to enact it under either the Thirteenth or the Fourteenth Amendments.²⁰³ After this decision, the belief that the same analysis would invalidate the civil conspiracy statute

[T]he chief complaint is not that the laws of the States are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section [of the bill] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection

Id. at 538 (quoting CONG. GLOBE, *supra* note 192, at app. 153).

²⁰⁰ CONG. GLOBE, *supra* note 192, at 478.

²⁰¹ The other two recodified statutes were criminal provisions. One was found unconstitutional in *United States v. Harris*, 106 U.S. 629 (1883). The other still exists today at 18 U.S.C. § 241 (1988).

²⁰² See *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1873) (limiting the reach of the Fourteenth Amendment's Privileges and Immunities Clause to a small subset of rights arising from national citizenship). See also *The Civil Rights Cases*, 109 U.S. 3 (1883); Gormley, *supra* note 195, at 543 (When the Supreme Court limited the Fourteenth Amendment's Privileges and Immunities Clause in the *Slaughter House Cases*, it also "removed much of the lifeblood from the Civil Rights Acts as well," since they "were cast in language that paralleled the privileges and immunities clause").

²⁰³ See *United States v. Harris*, 106 U.S. 629, 644 (1882). The *Harris* Court noted that parts of the Act, if separable, would be constitutional under the Thirteenth Amendment. *Id.* at 640-41. This dicta lent further support to the Court's reasoning in *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971), that § 1985(3) was a valid exercise of congressional power under the Thirteenth Amendment. See also note 233 and accompanying text *infra*.

caused the statute to lapse into a long period of disuse.²⁰⁴

The Supreme Court did not consider the civil conspiracy statute until 1951 in *Collins v. Hardyman*,²⁰⁵ a case that was to be overruled by *Griffin v. Breckenridge*²⁰⁶ twenty years later. The plaintiffs in *Collins* were members of a political group planning to oppose the Marshall Plan.²⁰⁷ They claimed that the defendants broke up their meeting through threats and a show of force. The plaintiffs further claimed that the defendants had conspired within the meaning of the statute to deprive them of the privileges and immunities and equal protection of the laws of the United States and of their right to peaceably assemble to discuss political issues.²⁰⁸

The Supreme Court dusted off the civil conspiracy statute long enough to hold that plaintiffs failed to make out a cause of action under it, because they did not assert state action in their claim.²⁰⁹ Emphasizing that the Act requires a conspiracy for the purpose of depriving one of the equal protection of the laws or equal privileges and immunities under the laws, the Court found that "private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so."²¹⁰ According to the Court, the purpose of the Act was to make the former slaves equal under the eyes of the law to other citizens and no more.²¹¹ Even though *Collins* stands for the proposition that state action is a required element of a claim under section 1985(3), thereby nar-

²⁰⁴ Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, 27 B.C.L. Rev. 911, 916 (1986) (The *Harris* decision "not only invalidated the criminal conspiracy portion of the statute, but appeared, by like reasoning, to doom Section 1985(3) as well.").

²⁰⁵ 341 U.S. 651 (1951) (The civil conspiracy statute was at that time codified as 8 U.S.C. § 47(3)).

²⁰⁶ 403 U.S. 88 (1971). For a discussion of *Griffin*, see notes 219-39 and accompanying text *infra*.

²⁰⁷ *Collins*, 341 U.S. at 653.

²⁰⁸ *Id.* at 654.

²⁰⁹ *Id.* at 655.

²¹⁰ *Id.* at 660-61.

²¹¹ *Id.* at 661. By referring to the right as one of equal treatment *under the law*, the concept of state action became entwined with the notion of equal treatment. Without state action, "the law" was not involved. Without involving the law, plaintiffs could not make out a claim under the statute. Thus, if plaintiffs alleged unequal treatment merely by private citizens, they did not allege unequal treatment under the law and did not have a valid cause of action.

rowing the possible uses of the statute, the case breathed new life into the statute as a mechanism for protecting civil rights at the federal level simply by dispelling the fear, instilled by *Harris* and the statute's subsequent obscurity, that the statute was unconstitutional.

In 1966, the Supreme Court in *United States v. Guest*²¹² reaffirmed the necessity of state action for a valid claim under the Civil Rights Act. In this case the Court examined 18 U.S.C. section 241,²¹³ the surviving criminal component of the Civil Rights Act. The defendants were indicted for conspiracy to threaten, intimidate and oppress black citizens in order to prevent those citizens from enjoying public accommodation.²¹⁴ Because the indictment alleged that the complainants were deprived of "the equal utilization, without discrimination upon the basis of race, of public facilities,"²¹⁵ it embraced rights protected by the Fourteenth Amendment's Equal Protection Clause.²¹⁶ Furthermore, since the Court found section 241 to be remedial, and therefore not conferring any separate substantive rights of its own, the Court held that section 241 only protected rights already secured by the Equal Protection Clause.²¹⁷ Finding it a "commonplace" that rights under this clause arise only when the state is involved, the Court concluded that section 241 can be invoked only with a showing of state action.²¹⁸

²¹² 383 U.S. 745 (1966).

²¹³ 18 U.S.C. § 241 (1964) provides in relevant part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same

. . . . They shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

²¹⁴ *Guest*, 383 U.S. at 748 n.1. According to the indictment, the defendants had planned to prevent the plaintiffs and other black persons from using public streets and facilities by shooting, beating or killing them and by damaging their property, making threatening phone calls, going in disguise on highways and other places, making false accusations leading to the arrests of black persons, and by burning crosses. *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 753.

²¹⁷ *Id.* at 754-55.

²¹⁸ *Id.* at 756. The Court did not determine the level of state action necessary because the facts of the case supported enough state involvement to prevent dismissal. *Id.* For example, the arrest of plaintiffs by means of false accusations fulfills the requirement of state involvement, because it involves the police in the conspiracy. Furthermore,

3. Modern Interpretation of Section 1985(3): *Griffin* to the Present

In 1971 the Supreme Court's decision in *Griffin v. Breckenridge*²¹⁹ resurrected section 1985(3) by holding that private conspiracies are actionable without a showing of any state involvement. The Court reached this conclusion even though it recognized that the language of the statute closely resembles the language of the Fourteenth Amendment.²²⁰ The Court also recognized that the long history of Fourteenth Amendment cases, which focuses on the search for the requisite state action, "has . . . made it . . . difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons."²²¹ Still the Court said that "nothing inherent in the phrase . . . requires the action working the deprivation [of equal protection of the laws] to come from the State."²²² Furthermore, the Court believed that the legislative history demanded that the statute cover private conspiracies.²²³ The facts that gave rise to *Griffin* lent further support to the Court's decision, because they seemed similar to the kind of Klan activity the drafters of the Act sought to punish.²²⁴ The plaintiffs, three black men, were traveling by car when the defendants, a group of white men, drove their truck into the car's path, preventing it from

the Court said that the allegation implied that agents of the state participated in the making of the false reports. *Id.*

The Court in *Guest* separately considered the charge that the defendants had criminally interfered with the complainants' right to travel. *Id.* at 757-60. First, the Court recognized the existence of the right of interstate travel, mentioning several sources for it but declining to choose one. *Id.* The Court then found that, since the right does exist under the Constitution, it was actionable under § 241. *Id.* at 760. However, since this charge did not allege a violation of the right to equal treatment, it did not implicate the Fourteenth Amendment and therefore did not require a showing of state action. *See id.* at 757-60. This analysis would not apply under § 1985(3) because § 1985(3) explicitly offers protection only in cases where the right to equal protection has been infringed.

²¹⁹ 403 U.S. 88 (1971).

²²⁰ *Id.* at 96-97.

²²¹ *Id.* at 97.

²²² *Id.*

²²³ *Id.* at 100-01 (quoting CONG. GLOBE, *supra* note 192, at app. 141 (Representative Shank's statement: "I do not want to see [this measure] so amended that there shall be taken out of it the frank assertion of the power of the national Government to protect life, liberty, and property, irrespective of the act of the State.")).

²²⁴ *Griffin*, 403 U.S. at 103 ("[T]he conduct here alleged lied so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not.").

passing.²²⁵ The defendants mistakenly believed that the car contained a civil rights worker.²²⁶ They forced the men out of the car, clubbed them about the head and threatened them with firearms.²²⁷ The plaintiffs brought suit under section 1985(3), alleging a conspiracy to deprive them of the equal protection of state and federal laws, including their First Amendment freedom of speech, their Thirteenth Amendment right not to be enslaved, their right to due process and their right to travel the public highways.²²⁸ The *Griffin* Court articulated a four-part test for claims under section 1985(3). The complaint must allege:

(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.²²⁹

Only the second requirement is at issue here. In *Griffin* the plaintiffs' claims of deprivation of Thirteenth Amendment rights and deprivation of the right of interstate travel fulfilled the second requirement.²³⁰ The Court then held that requiring racial animus by the defendants as part of the cause of action would limit the statute to only those cases with which the sponsors of the Act were concerned.²³¹

²²⁵ *Id.* at 90.

²²⁶ *Id.*

²²⁷ *Id.* at 90-91.

²²⁸ *Id.* at 91-92. Regarding the right to travel claim, the complaint alleged: "By their conspiracy and acts pursuant thereto, the defendants have . . . prevented the . . . plaintiffs . . . from enjoying and exercising . . . their rights to travel the public highways without restraint in the same terms as white citizens in Kemper County, Mississippi" *Id.*

²²⁹ *Carpenters v. Scott*, 463 U.S. 825, 828-29 (1983) (interpreting *Griffin*, 403 U.S. at 102-03).

²³⁰ See *Griffin*, 403 U.S. at 102, 104-05.

²³¹ *Id.* at 101 ("That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others."). The Court was certain that the statute was meant to cover some but not all private conspiracies. *Id.* Requiring racial animus was one way to insure that the legislative intent of the statute was carried out. The Court also explained that the conspiracy must also be aimed at the "deprivation of the equal enjoyment of rights secured by the law to all" and that it was not intended to punish an ordinary assault and battery committed by two or more persons. *Id.* at 101-02. The Court showed its concern that the statute would be read too broadly in light of its holding when it said that the statute should not be interpreted as a general tort law. *Id.* While the Court tried to

The *Griffin* Court found it necessary to identify a source of congressional power to reach the private conspiracy under the circumstances of the case.²³² The Court determined that Congress could create legislation to protect plaintiffs against the infringement by private persons of the rights secured to them under the Thirteenth Amendment.²³³

More difficult, however, was the question whether Congress could provide a civil remedy for the violation of the right of interstate travel by private parties. The Court found that the constitutional right of interstate travel does exist, "does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference."²³⁴ Thus, so long as plaintiffs could prove that this right was meant to be discriminatorily impaired by the conspiracy, the claim was within the statute, and Congress had authority to reach the pri-

express its concerns over what the statute did not cover, it was unclear regarding what the statute did cover. The Court did not attempt to remedy this vagueness until it decided *Carpenters* in 1983.

²³² Gormley, *supra* note 195, at 548.

The Court, under *Griffin*, had to be sure that Congress had the authority to create § 1985(3) to remedy the underlying deprivation for each separate deprivation that was alleged. In other words, the Court had to identify separately the congressional authority to create legislation that provided a remedy for a conspiracy to violate the Thirteenth Amendment, the right to travel, or whatever deprivation the plaintiffs alleged.

²³³ *Griffin*, 403 U.S. at 104-06.

In its terse discussion of the Thirteenth Amendment, the *Griffin* Court used sweeping language to express its certainty that section two of that amendment enabled Congress to enact § 1985(3) as a means of redressing private discrimination. *Id.* at 105 ("there has never been any doubt of the power of Congress to impose liability on private persons under § 2 of that [the Thirteenth] amendment"). One of the cases cited by the Court as authority for this proposition was *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). In *Jones*, the Court upheld, under the Thirteenth Amendment, 42 U.S.C. § 1982. That statute guarantees all citizens the right to "inherit, purchase, lease, sell, hold, and convey real and personal property," 42 U.S.C. § 1982 (1988), and it originates from the Civil Rights Act of 1866. *Jones*, 392 U.S. at 422. In *Jones* the Court concluded that § 1982, in its original form, was meant to prohibit "all racially motivated deprivations of the rights enumerated in the statute . . ." *Id.* at 426. *Jones* is certainly ample authority that Congress can enact legislation, pursuant to the Thirteenth Amendment, that is aimed at redressing private discrimination. However, since *Jones* relied on the legislative history of a different Act to determine that all racially motivated deprivations, private and non-private, are redressable, the case does not offer any guidance on the question of state action in § 1985(3) cases where the Thirteenth Amendment is not the source of the underlying deprivation.

²³⁴ *Griffin*, at 105-06. The Court relied on a cursory history of the right to travel to conclude that the "right to pass freely from State to State has been recognized as among the rights and privileges of National Citizenship" and that Congress can protect these rights by appropriate legislation. *Id.* at 106.

vate conduct through the statute.²³⁵

Because the Court did not characterize the substantive right of interstate travel as arising from the Fourteenth Amendment, the question remained whether state action was necessary for 1985(3) actions based on an asserted Fourteenth Amendment right.²³⁶ The constitutional question whether Congress has the authority under section 5 of the Fourteenth Amendment²³⁷ to reach purely private conspiracies was not considered by the Court in *Griffin*.²³⁸ Specifically, the Court did not address whether section 5 would allow Congress to go beyond imposing duties on the state by allowing it to impose duties on private individuals, thus creating new substantive equal protection rights.²³⁹

In 1979 the Court began closing the door it had opened with *Griffin*. The Court in *Great American Federal Savings & Loan Association v. Novotny*²⁴⁰ narrowed the scope of section 1985(3) when it held that the statute was remedial and did not create new substantive rights. Labeling the statute as remedial implied

²³⁵ *Id.* Thus, Congress had authority to create a statute imposing civil liability on those private persons who interfered with the right of interstate travel because the right was protected by some undetermined portion of the Constitution other than the Fourteenth Amendment.

²³⁶ See Comment, *State Inaction and Section 1985(3)*: United Brotherhood of Carpenters & Joiners of America v. Scott, 71 IOWA L. REV. 1271, 1282 (1986) [hereinafter *Inaction*]; see also Shatz, *supra* note 204, at 920.

²³⁷ "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

²³⁸ *Griffin*, 403 U.S. at 107 ("[T]he allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment.").

²³⁹ If section 5 so authorized Congress, then section 1985(3) can be viewed as a substantive statute protecting fourteenth amendment rights from wholly private interference. Because substantive statutes themselves create rights, plaintiffs, in this case, would need only to allege deprivation of section 1985(3) rights without relying on alternative rights. If, on the other hand, section 5 does not authorize Congress to create substantive statutory rights in furtherance of fourteenth amendment goals, then section 1985(3) is a remedial statute and thus merely sets forth the method of enforcing previously created rights. Under this view, plaintiffs would have to identify the source of the right on which they would rely.

Comment, *Protected Rights and Classes Under 42 U.S.C. § 1985(3)*: United Brotherhood of Carpenters & Joiners Local 610 v. Scott, 17 CONN. L. REV. 165, 188 (1984).

²⁴⁰ *Novotny*, 442 U.S. 366 (1979) (holding that the plaintiff, who believed he was fired for his support of female employees, could not use § 1985(3) to redress violations of Title VII). The Court said that "Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Id.* at 372.

that state action was necessary in 1985(3) cases where the infringed substantive right was protected only against state action, because section 1985(3) cannot grant a wider cause of action against private actors than permitted by the constitutional provision conferring the substantive right.²⁴¹

The implication in *Novotny* became the express holding of the Court when, in *Carpenters v. Scott*, it finally articulated the necessity for state action in certain section 1985(3) claims.²⁴² The plaintiffs in *Carpenters* were two nonunion employees of a construction company who were assaulted by a group of protesters consisting of union members angered by the construction company's hiring practices.²⁴³ Plaintiffs' 1985(3) claim specifically asserted that the conspiracy was aimed at depriving them of their First Amendment rights.²⁴⁴ One of the reasons used by the Court in its holding that the plaintiffs had not made out a claim under section 1985(3) was that the plaintiffs had not proved involvement by the state.²⁴⁵

The *Carpenters* Court recognized that section 1985(3) reaches some private conspiracies,²⁴⁶ but the Court found that a claimed deprivation of certain rights requires state involvement. The plaintiffs were trying to claim that the denial of their First Amendment rights was in turn a deprivation of the equal protection of the laws within the meaning of section 1985(3). The First Amendment is directly aimed at Congress and has been extended to apply to states through the Fourteenth Amend-

²⁴¹ *Novotny* said that § 1985(3) only provides a remedy for the violation of certain rights already protected elsewhere. As such, it cannot be read to create new substantive rights, and it cannot provide a remedy when the asserted right has not been violated. Therefore, *Novotny* implies that plaintiffs who invoke § 1985(3) as a remedy for a violation of rights protected only against state infringement (for example rights found within the Fourteenth Amendment) must show that the state was somehow involved in the violation. Otherwise, the underlying substantive right, for which § 1985(3) is supposed to provide the remedy, has not been violated. See *Inaction*, *supra* note 236, at 1284 (agreeing that *Novotny* implies state action will be necessary in certain § 1985(3) cases and finding that most circuits following the *Novotny* decision required a showing of some level of state action in 1985(3) cases).

²⁴² *Carpenters*, 463 U.S. 825 (1983).

²⁴³ *Id.* at 828.

²⁴⁴ *Id.* at 830.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 832-33 ("[*Griffin*] held that § 1985(3) reaches purely private conspiracies and, as so interpreted, was not invalid on its face or as there applied Section 1985(3) constitutionally can and does protect [the rights protected by the Thirteenth Amendment and the right to travel] from interference by purely private conspiracies.").

ment.²⁴⁷ The Fourteenth Amendment is specifically designed to protect individuals against state action, not against wrongs done by other individuals.²⁴⁸ The Court then reasoned that:

Had § 1985(3) in so many words prohibited conspiracies to deprive any person of the equal protection of the laws guaranteed by the Fourteenth Amendment of freedom of speech guaranteed by the First Amendment, it would be untenable to contend that either of those provisions could be violated by a conspiracy that did not somehow involve or affect a State.²⁴⁹

Thus, the Court concluded that plaintiffs could not make out a conspiracy to violate First Amendment rights without proof of state involvement.²⁵⁰

The Second Circuit itself recently applied this reasoning in *New York State National Organization for Women (N.O.W.) v. Terry*.²⁵¹ In that case the plaintiffs claimed that section 1985(3) was violated when the defendants, abortion protesters, blocked access to abortion clinics.²⁵² The plaintiffs specifically alleged the defendants had conspired to deprive them of the right of interstate travel and the right to obtain an abortion. The court, correctly applying the standards set out by *Griffin* and *Carpenters*, found for the plaintiffs on the interstate travel claim because "[t]he right of interstate travel is guaranteed by the Constitution," and "[d]eprivations of that right are actionable under § 1985(3) with no need to show any state action or involvement."²⁵³ The court however chose not to reach the mer-

²⁴⁷ *Id.* at 831.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 832. For a recent court of appeals application of *Carpenters*, see *Lewis v. Pearson Found., Inc.*, 908 F.2d 318 (8th Cir. 1990), where the court said: "To determine whether [the plaintiff] must plead state action in order to prosecute her claim under Section 1985(3), . . . we must look not to the statute itself but rather to the nature of the underlying constitutional right that she seeks to assert through the statute." *Id.* at 321. In *Lewis*, plaintiff's underlying right was the right to choose whether to continue her pregnancy; this choice has its source in the rights of privacy and the Fourteenth Amendment. The Eighth Circuit found that, since "Appellees cite no Supreme Court or appellate cases limiting these rights to protect against only official conduct, . . . we decline to place any such limitation on them here." *Id.* at 322. The dissent did point out that the Fourteenth Amendment protects individuals only against governmental interference, and therefore under *Carpenters*, the plaintiff needed to show state action. *Id.* at 326.

²⁵¹ 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

²⁵² *Id.* at 1344.

²⁵³ *Id.* at 1360. The *N.O.W.* court did not explain why state action was unnecessary.

its of the plaintiffs' claim that the right to obtain an abortion had been infringed by the conspiracy.²⁵⁴ It recognized that "[w]hen the asserted constitutional deprivation is based upon a right guaranteed against government interference — for example rights secured by the Fourteenth Amendment — plaintiffs must demonstrate some 'state involvement.'"²⁵⁵ Furthermore, the district court had ruled that because the abortion right comes from the right to privacy which is derived from the Fourteenth Amendment, the plaintiffs were required to show state involvement.²⁵⁶ The district court held that plaintiffs had met this requirement, but the Second Circuit found it unnecessary to reach this question since it found for plaintiffs on the travel claim.²⁵⁷

Thus, the Second Circuit in *N.O.W. v. Terry* recognized the necessity for state action in a section 1985(3) claim when the deprived right is derived from the Fourteenth Amendment. The court undertook that analysis in *N.O.W. v. Terry* even though it never had to reach the question. Yet, in *Spencer*, when this analysis was crucial and, as this Comment argues, determinative of the outcome, the court failed to address the state action requirement adequately.

4. *Spencer v. Casavilla*

Under *Griffin v. Breckenridge* there are four requirements

Instead, for support the court cited to Supreme Court cases that "'firmly' establish [the] right of interstate travel 'is assertable against private as well as governmental interference.'"²⁵⁴ *Id.* (citing *Carpenters*, 463 U.S. at 832-33; *Novotny*, 442 U.S. at 383 (Stevens, J., concurring); *Griffin*, 403 U.S. at 105-06).

²⁵⁴ *Id.* at 1361.

²⁵⁵ *Id.* at 1358.

²⁵⁶ *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247, 1260 (S.D.N.Y. 1989). *But see* *Lewis v. Pearson Found., Inc.*, 908 F.2d 318 (9th Cir. 1990); *see also* note 259 *supra*.

The Fourth Circuit, in its treatment of a factually similar case, cited the Second Circuit's decision in *N.O.W.* as support for allowing § 1985(3) claims where abortion protesters have infringed on the right to interstate travel. *N.O.W. v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990), *cert. granted sub nom.* *Bray v. Alexandria*, 111 S. Ct. 1070 (1991). This case, which is now pending, represents the chance for the Supreme Court to clarify the confusion surrounding § 1985(3) and the right to travel. However, since the *Bray* case seems more concerned with the issue of gender-based animus as a possible substitute for racial animus in § 1985(3) cases, 914 F.2d at 585, and since the case did not deal with intrastate travel, *see id.*, there is little likelihood that *Bray* will clarify the § 1985(3) right to travel confusion.

²⁵⁷ *N.O.W.*, 886 F.2d at 1361. The Second Circuit agreed that the requirement would have to be met.

to be met by a claim under section 1985(3).²⁵⁸ In *Spencer* the plaintiff's claim that the right of intrastate travel was infringed by the defendants was asserted to fulfill the second requirement: that the conspiracy deprived plaintiffs of the equal protection or privileges and immunities of the laws.²⁵⁹ In order to do this, "[t]he plaintiff must locate a right independently secured by state or federal law"²⁶⁰ The Spencers asserted that the decedent's federally protected right of intrastate travel was directly infringed by the defendants' conduct. There are two types of federally guaranteed rights that can be used in the section 1985(3) context. The first is a federally guaranteed right that is secured only against governmental interference. If plaintiffs are asserting infringement of this type, then the defendants must be state actors or actors seeking to influence the state to act in a prohibited way.²⁶¹ If, on the other hand, the federally guaranteed right is secured to all without the requirement of governmental interference, then the conspiracy can be entirely private.²⁶² If, as this Comment has concluded, the source of the right of intrastate travel is the Fourteenth Amendment,²⁶³ then the Spencers alleged the deprivation of a right protected only against governmental interference, and therefore they needed to demonstrate state action.

In *Spencer* the Second Circuit failed to examine the state action requirement adequately. First, the court lumped the right of intrastate travel with the right of interstate travel, without pointing to a constitutional source for either.²⁶⁴ Then the court

²⁵⁸ See note 229 and accompanying text *supra*.

²⁵⁹ See *Carpenters v. Scott*, 463 U.S. 825, 829 (1983).

Although neither the district court nor the Second Circuit in their consideration of *Spencer* explained how the plaintiffs fulfilled the other three requirements of § 1985(3), the facts demonstrated that the requirements were met. First, the conspiracy element can be inferred from the fact that the six white youths acted together when they drove in four cars following Spencer as he tried to escape on his bicycle and that the four defendants acted together when they beat him. See *Spencer*, 903 F.2d at 175. The facts demonstrate an abundance of acts in furtherance of this conspiracy that fulfill the third requirement. See *id.* Lastly, fulfilling the fourth requirement, Spencer and the plaintiffs suffered obvious injury since the attack resulted in Spencer's death. See *id.*

²⁶⁰ *Stevens v. Tillman*, 855 F.2d 394, 404 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ See notes 188-91 and accompanying text *supra*.

²⁶⁴ See *Spencer*, 903 F.2d at 174.

found that state action was not required when the right to travel is the right protected by section 1985(3).²⁶⁵ The Second Circuit's analysis simply relied on the Supreme Court's decision in *Griffin v. Breckenridge*, which upheld the use of the right to travel without a showing of state involvement in a section 1985(3) claim.²⁶⁶ The court seemed to reason that, since *Griffin* did not require state involvement, state involvement need not be shown by the Spencers. However, *Griffin* is distinguishable as an interstate travel case,²⁶⁷ and thus the Second Circuit should have conducted an analysis to decide which provision of the Constitution guarantees the right of intrastate travel. Only then could the court determine if state involvement was a necessary component of the action.

Since *Griffin*, the state action issue had become inseparably linked to the question of congressional authority to create a private conspiracy statute.²⁶⁸ However, when *Carpenters* held that state action was required for section 1985(3) claims which alleged the deprivation of rights protected only against the state, the Court relieved lower courts of the burden of pointing to the congressional authority for the statute in every case. The Court in *Carpenters* was responding to the overexpansion of the statute triggered by the *Griffin* decision. Federal courts after 1971 were expanding section 1985(3) greatly beyond its original scope and were ignoring the warning of its drafters.²⁶⁹ The *Griffin* Court itself warned that the statute should not become a general federal tort law.²⁷⁰ Also, requiring lower courts to identify the congressional authority for the statute in each case was a heavy burden to place on courts that usually do not conduct such ex-

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ The Court in *Griffin* dealt with an interstate travel case and indicated that the source for the right to travel is not necessarily the Fourteenth Amendment. *Griffin*, 403 U.S. 88, 105 (1971). However, the source of a right of intrastate travel may be solely the Fourteenth Amendment. See notes 117-91 and accompanying text *supra*.

²⁶⁸ See note 232 and accompanying text *supra*.

²⁶⁹ Gormley, *supra* note 195, at 557 (citing *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975), *vacated per curiam*, 507 F.2d 216 (5th Cir. 1975) (found actionable § 1985(3) claim where conspiracy was aimed at environmentalists); *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972) (found actionable § 1985(3) claim where conspiracy was aimed at members of a single family)).

²⁷⁰ *Griffin*, 403 U.S. at 101 ("That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others.").

tensive constitutional analyses. As a result, *Carpenters* represented a narrowing of the scope of the statute.²⁷¹ It is now clear that section 1985(3) protects only certain rights from purely private encroachment,²⁷² while others will require a showing of state involvement.²⁷³

According to the Court in *Carpenters*, "*Griffin* did not hold that even when the alleged conspiracy is aimed at a right that is by definition a right only against state interference the plaintiff in a section 1985(3) suit nevertheless need not prove that the conspiracy contemplated state involvement of some sort."²⁷⁴ In other words, if the right alleged is protected against more than state interference, the plaintiff need not allege state involvement, but conversely if the right is designed solely to protect against infringements by the state, state involvement is required. The *Carpenters* Court explained that in *Griffin* it upheld the use of the interstate travel right in a purely private conspiracy because the conspiracy had been aimed at interfering with rights constitutionally protected against private, as well as official, encroachment.²⁷⁵ Restated, this implies that the right of interstate travel does not come from a provision in the Constitution aimed solely at the state. The Court in *Griffin* determined that the source of the right to travel was something other than the Fourteenth Amendment (without determining the actual source) in order to show that state action was not a necessary part of the claim. Thus, in every 1985(3) claim, the court should determine from where the federally claimed right originates so that it can decide whether or not state action must be alleged.

The Second Circuit should have conducted an analysis of the right to travel and determined the source of the right of intrastate travel. This Comment asserts that the most likely source is the Fourteenth Amendment's Due Process Clause. The court then should have applied the *Carpenters* reasoning. Under

²⁷¹ *Inaction*, *supra* note 236, at 1272 ("After [*Carpenters*], the use of section 1985(3) has been drastically foreclosed as a remedy against private conspiracies . . .").

²⁷² Specifically, § 1985(3) protects against private conspiracies that infringe on the right to travel interstate and the Thirteenth Amendment, because those rights are independent of state action.

²⁷³ Conspiracies aimed at the deprivation of rights secured by the Fourteenth Amendment will require a showing of state involvement. See *Inaction*, *supra* note 236, at 1274.

²⁷⁴ *Carpenters*, 463 U.S. 825, 833 (1983).

²⁷⁵ *Id.*

Carpenters, the Supreme Court determined that Congress could not reach a purely private violation of the Fourteenth Amendment. Because there was no showing of state involvement, the Spencers' claim should have been dismissed.²⁷⁶ While it is possible that *Carpenters* has narrowed the scope of the statute too much, the Second Circuit cannot refuse to address what is clearly the controlling precedent.

The consequence of *Spencer* is that now any tort, committed by two or more persons against someone of a different race, can give rise to a claim in federal court. It is clear that the drafters of the statute and the Supreme Court since *Griffin* wanted to avoid this outcome. Yet *Spencer* has broadened the statute once again. The Spencers can now bring what is essentially an ordinary state tort claim in federal court. Given the desire to limit the number of cases that qualify for federal jurisdiction in order to lighten the burden on the federal courts, this outcome is undesirable.²⁷⁷ Furthermore, denying federal jurisdiction in cases

²⁷⁶ A dismissal of the Spencers' claim would be disturbing, however, since the racially animated conduct that gave rise to *Spencer* is precisely the type of evil the statute was designed to remedy. Perhaps the Spencers could claim that the failure of the police to protect the decedent constitutes state action. See *Inaction*, *supra* note 236 (arguing that state inaction fulfills the state action requirement and is what the drafters of § 1985(3) had in mind). However, this argument seems rather weak.

Another possibility for the Spencers is to use § 1985(3) to assert a deprivation of state law rights. This kind of § 1985(3) claim is a "type two" claim under the types advanced by *Stevens v. Tillman*, 855 F.2d 394, 404 (7th Cir. 1988). See note 20 *supra*. Such a claim would assert that a right secured by state law was deprived by the conspiracy with the proper racially motivated animus. The claim must further allege that the deprivation of the state right was designed to and did in fact interfere with the victims' exercise of a federally created right. *Stevens* gives as an example a cross-burning, which violates state trespass and assault laws, that is designed to prevent the victims from exercising their rights to speak, associate and vote. 855 F.2d at 404. In *Spencer*, the federal right could be the right to intrastate travel, and if alleged as a type two claim, the plaintiffs would not need to show state action. See Gormley, *supra* note 195, at 561. However, the Supreme Court chose not to address the viability of this type of claim in *Carpenters*. 463 U.S. 825, 833-34 (The Court recognized that the lower court had failed to consider plaintiffs' claim that their state law rights had been infringed by the conspiracy but found it unnecessary to remand for this issue since it found that plaintiffs' claim was otherwise lacking because it did not show racial or class-based animus.).

Lastly, the Spencers might still have a § 1985(3) claim for the infringement of their rights under the Thirteenth Amendment. The Second Circuit chose not to deal with this claim since it found for plaintiffs on their other claim. *Spencer*, 903 F.2d at 176. *Griffin* represents solid authority upholding a § 1985(3) claim alleging the violation of the Thirteenth Amendment. *Griffin*, 403 U.S. 88, 104-05 (1971). For a further discussion of the Thirteenth Amendment see notes 203 and 233 and accompanying text *supra*.

²⁷⁷ The 1988 increase of the amount in controversy from \$10,000 to \$50,000 in order

such as *Spencer* would not work a terrible injustice because these plaintiffs have recourse in state court and still may have successful federal claims.²⁷⁸

CONCLUSION

The Second Circuit's failure to point to a constitutional source for the right of intrastate travel led to the erroneous conclusion that section 1985(3) was available to the plaintiffs. Since this Comment determined that the most likely source of the right of intrastate travel is the Fourteenth Amendment's Due Process Clause, the infringement of the right could not be asserted against purely private actors. *Spencer* sets a dangerous precedent which could allow section 1985(3) to become the source of federal jurisdiction for claims that were not meant to be encompassed by the statute.

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to qualify for federal diversity jurisdiction is an example of recent attempts to ease the case load of federal courts. The increasing use of magistrates for discovery and other matters in the federal system demonstrates as well that the federal courts are stretched to the limit. 28 U.S.C. § 1332 (1988).

²⁷⁸ See note 276 *supra*.